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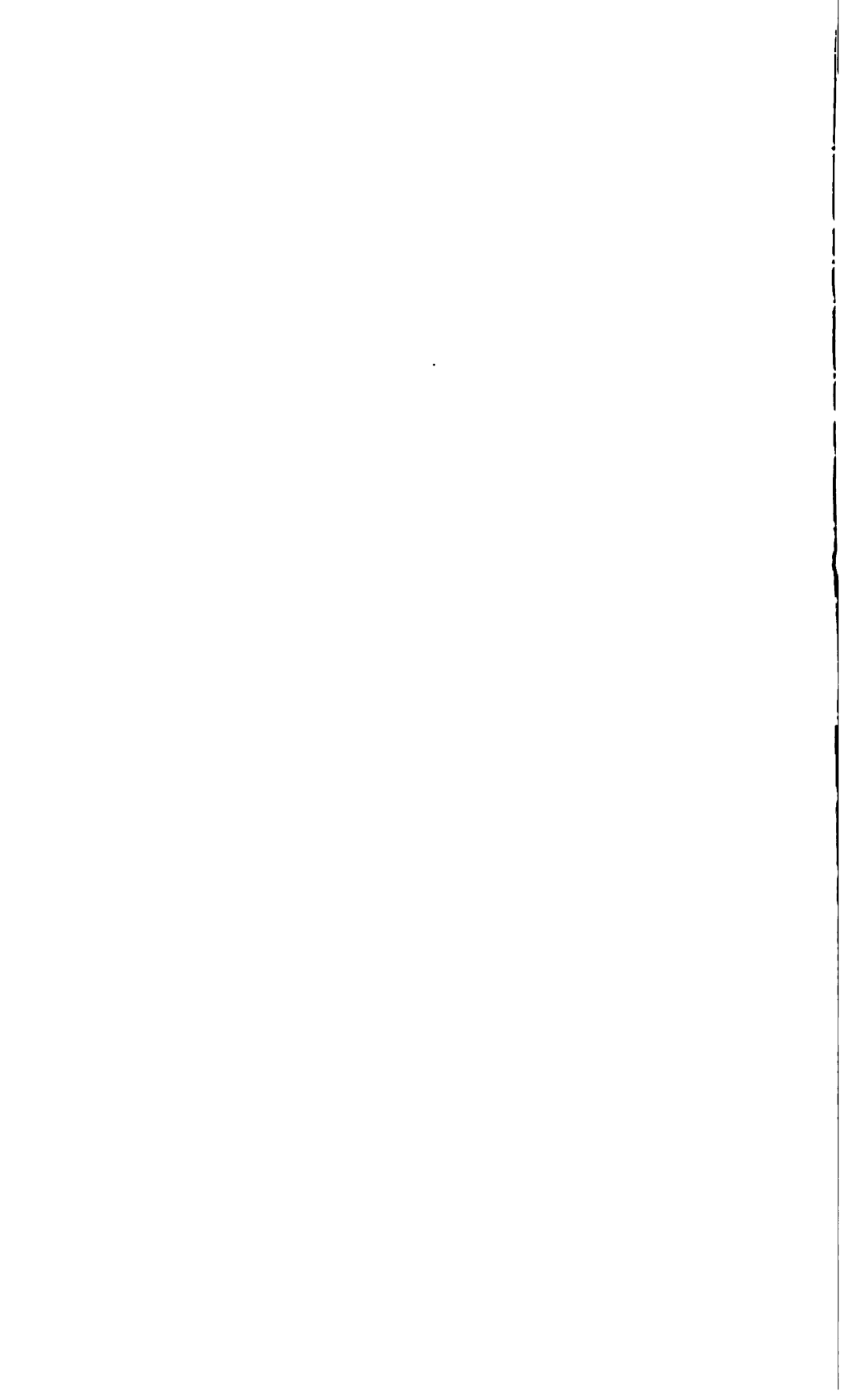
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THE
LAW AND PRACTICE
OF
INJUNCTIONS
IN EQUITY
AND AT
COMMON LAW.

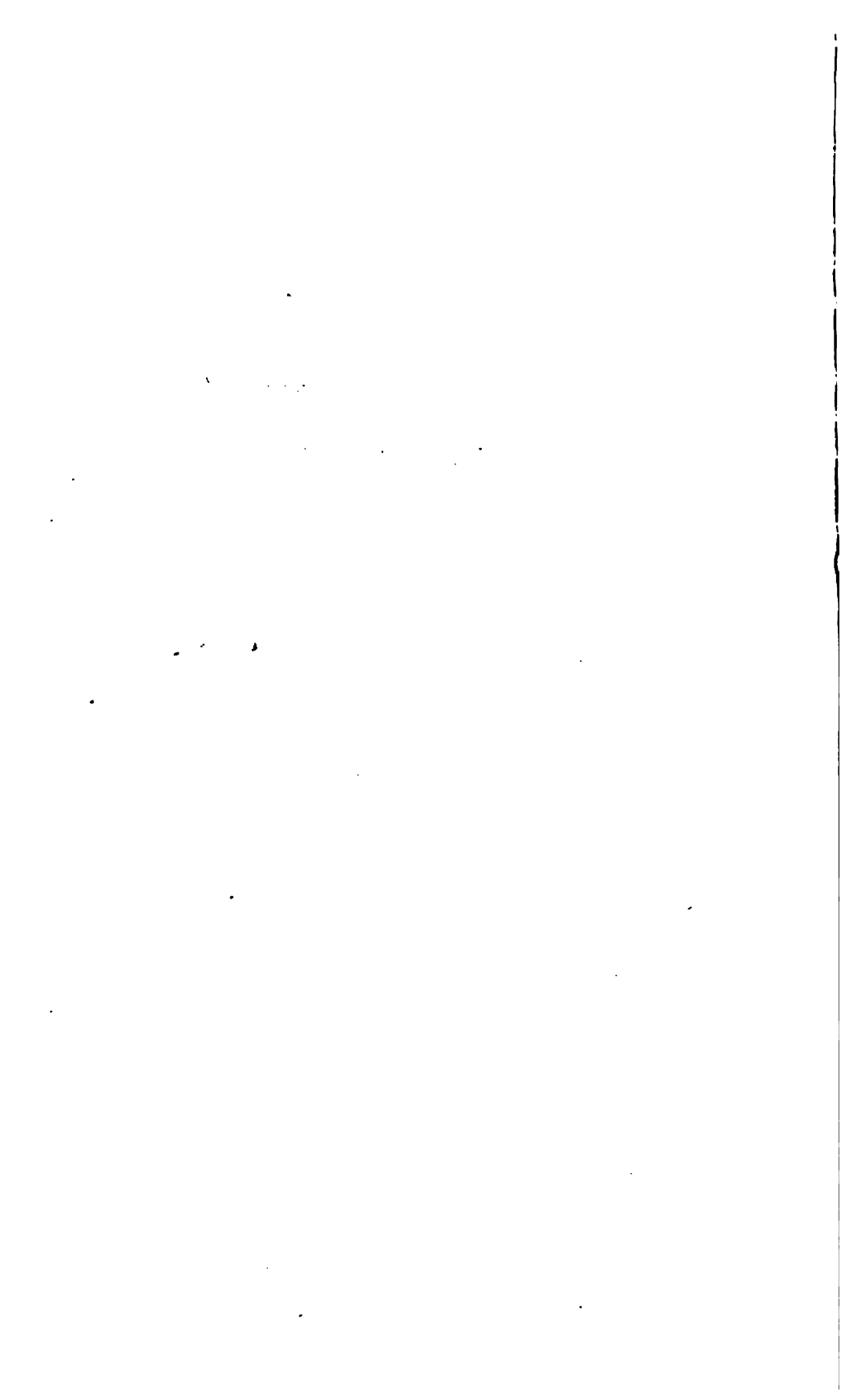
By WILLIAM JOYCE, Esq.,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

IN TWO VOLUMES.

VOL. I.
PAGES 1 TO 778.

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"PRAETORES PAULATIM ASPERITATEM JURIS CIVILIS CORRIGENTES, SIVE QUOD  
DECRETUM IMPLERENT:"—INST. I. 3, T. 2, CL. 3.  
~~~~~

LONDON:
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1872.



P R E F A C E.

THE object of the Author in the following work is to produce a complete exposition of the Law and Practice of Injunctions.

Where the Author has thought it useful he has stated the particular circumstances of the case cited, to such an extent as will more clearly elucidate the principle of the decision. It is believed that no proposition is stated that is not founded on, or has not been originated by, the particular case or cases cited in support of that proposition.

The principles of the decisions cited are, as a rule, given (either in a direct or narrative form) in the very words of the judges who enunciated them.

The Author believes that every case in the English Courts of Equity (together with the cases on Injunctions in the House of Lords, and in the Privy Council and Irish Courts—with the Scotch cases of Interdicts in the House of Lords), where an Injunction has formed any material portion of the relief asked for, has been noticed.

In addition to the above-mentioned cases, a selection from the American cases has been added. For these, the Author is, with some few exceptions, indebted to Mr. F. Hilliard's very able work on Injunctions (2nd Edit.).

In the Common Law parts of the work it is believed that all the reported cases on the subject of Injunctions at Common Law have been cited.

The Indexes, at the same time that they are in the alphabetical form, are also to a considerable extent analytical, and, it is hoped, both comprehensive and concise.

Upwards of 3500 cases and 160 statutes are cited.

W. J.

LINCOLN'S INN, *April*, 1872.

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INTRODUCTION.

Definition of an Injunction.

1. An injunction is a writ remedial, issuing by the order of a Court of Equity (1), in those cases where the plaintiff is entitled to equitable relief, by restraining the commission or continuance of some act of the defendant (2).

2. The old distinction between *common* and *special* injunctions no longer exists; the Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86, s. 58), has abolished the *common* injunction (3), and all injunctions are now *special*, that is to say, granted upon the merits only, and at any stage of the suit after a bill is on the file (4), and, in an extremely urgent case, an injunction has been granted upon petition and affidavit, although no bill has been on the file (5). A *prima facie* case must now be made by the bill and supported by affidavit (6).

3. Injunctions are either *ex parte*, that is to say, granted upon the *ex parte* statement of the plaintiff, or are such as are granted upon hearing both plaintiff and defendant.

(1) And now, in some cases (*vide post*, "Injunctions at Common Law") by a Court of Common Law acting as a Court of Equity.

(2) *v. Eden* on Injunctions, p. 1.

(3) The *common* injunction was grantable as an order of course without reference to the merits of the case, upon the defendant making default in appearing, or in pleading, answering, or demurring within the time prescribed by the then practice of the Court, and was that which was most generally ob-

tained in suits where the object of the injunction was to stay proceedings at law (*v. Drewry* on Injunctions, pp. vii., viii., Introduction; *Eden*, Inj. 68. "The common injunction stays proceedings at law till answer or further order:" *Moore v. Usher*, 7 Sim. 383.)

(4) *v. Drewry*, *ut ante*.

(5) *Mayor of London v. Bolt*, 5 Ves. 130 (*Eden*, Inj. 320).

(6) *Senior v. Pritchard*, 16 Beav. 473; *Lovell v. Galloway*, 17 Beav. 1.

4. The *ex parte* injunction is obtainable in urgent cases before the appearance of the defendant, and even without notice to him. It is an injunction that is granted where delay might produce irreparable injury to property, and is also granted in urgent cases to restrain proceedings at law (1) (2).

(1) *v. Drewry*, p. viii., citing 8 Ves. 522; 2 Mer. 476; *Lane v. Williams*, 6 Ves. 798; *Thorpe v. Hughes*, 3 My. & Cr. 753.

(2) Except the *interdicta* and the action founded on them, there does not appear to have been any remedy in the Roman law like the English law of Injunctions: "*Erant autem interdicta formæ atque conceptiones verborum quibus prætor aut jubebat aliquid fieri, aut fieri prohibebat.*" Inst. l. 4, tit. 15. These interdicts were divided into three kinds, namely, "*aut prohibitoria, aut restitutoria, aut exhibitoria.*" Ib. l. 3, tit. 15, cl. 1; and examples of these interdicts are given in the same title. But the interdicts there described were only used in cases where public interests were or might be affected by the conduct of the parties interdicted from doing or not doing any act; they were not used in cases merely private, or affecting the rights of private individuals only, unless a breach of the public peace might probably result from not interfering (Sandars, Institutes of Justinian, 588), and except the necessity for interference was immediate (Ib. 74), then they were granted to protect private rights (Ib.) But by the time of Justinian the interdict had become obsolete, and the same remedy was obtained by a shorter way without interdicts, namely, by an action in which judgment was given without any interdict having been previously

decreed, the judgment given in this action being given without interdicts, exactly as if the action called "*utilis actio*" (the "*utiles actiones*" were an extension of the "*directæ actiones*" (i. e., established by law or precedent) which embraced cases analogous to, but not among, those to which the "*directæ*" applied (Sandars, Inst. Just. 73, citing Gaius, 4, 38)) had been given in pursuance and consequence of an interdict, which was the old mode of procedure before the change of which we are now speaking took place (Inst. l. 4, tit. 15, cl. 9). Interdicts were wholly placed on the prætorian authority (Sand. Ib. 589), and were pronounced by the prætors under the extraordinary jurisdiction which they exercised in mitigation of the severity or injustice which would have arisen from an adherence to the technical form of the civil law ("*Prætores paulatim asperitatem juris civilis corrigentes.*" Inst. l. 3, tit. 2, cl. 3) and formed a branch of the "*jus honorarium*" or law of the prætors, as distinguished from the "*jus civile*" (Sand. Ib. 19, 92; Inst. l. 1, tit. 2, cl. 7). The prætor would also direct a security to be given (*cautio damni infecti*) to indemnify against any future damage (*damnum futurum*) as the injury to one's premises, apprehended from the possible fall of an ill-repaired house: Inst. l. 3, tit. 18, cl. 2; Dig. 39, 2, 2; Sand. 439.

THE
LAW AND PRACTICE OF INJUNCTIONS.

PART I.

OF INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL
NATURE (NOT BEING PROCEEDINGS IN OTHER COURTS).

CHAPTER I.

REAL PROPERTY (INCLUDING LEASEHOLDS).

SECT. 1. *Distress—Rent—Rent-charge.*

1. A Court of Equity has no jurisdiction, at the suit of an owner of property, to restrain a mere stranger from vexatiously distraining on or otherwise molesting the tenant; and where a vendor has executed a legal assignment of property to a purchaser, the Court of Chancery will not, on the application of the latter, interfere by injunction to restrain the former from illegally distraining upon the tenants of the property assigned for alleged arrears of rent accrued since the assignment (1); and where the plaintiff had demised a number of small leasehold houses to the defendant, and the defendant had committed a forfeiture, and the plaintiff had re-entered and determined the lease, and the defendant thereupon distrained upon the tenants, and prevented the plaintiff taking possession and repairing, and the plaintiff apprehended a forfeiture, and the defendant had also, being insolvent, received the rents, and in consequence of his conduct the property had become greatly depreciated, and some of the houses had been abandoned by the tenants, a demurrer was allowed to a bill praying an

No Equity at
suit of owner
to restrain
mere stranger
distraining on
tenant.

(1) *Best v. Drake*, 11 Hare, 369; *Drake v. West*, 22 L. J. (Ch.) 375.

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account of the rents and an injunction to restrain the defendant from receiving the rents and distraining (1).

2. A purchaser of one of several parcels into which land has been divided, shall not be subject to the rent-charge on the whole, and the grantor will be restrained by order (2).

Property in
the hands of a
receiver.

3. When property over which a person claims a right to distrain, is in the hands of a receiver, the Court of Chancery will give leave to distrain, unless it is clear that the property is not within the power of distress (3).

SECT. 2.—*Possession—Quieting Possession.*

Defendant in
possession.

1. Where a defendant is in possession of an estate, and a plaintiff, claiming possession, seeks to restrain him from acts of spoliation, the Court will not grant an injunction unless the acts are so flagrant as to justify it in departing from the general rule or principle (4). Where a plaintiff is in possession, and they are the acts of a stranger, the tendency of the Court is not to grant an injunction, and will leave him to his remedy at law against such stranger committing such acts, unless there are special circumstances, or they tend to the destruction of the inheritance (5). But where a plaintiff is in possession, and seeks to restrain the defendant claiming title, the tendency of the Court is to grant the injunction unless there are special reasons why it should not, at least where acts do, or may tend, to the destruction or injury of the estate, and *semble* the tendency of modern decisions, continually increasing from year to year, is to break down the old distinctions between waste and trespass (6). In *Lowndes v. Bettie*, a plaintiff in possession filed a bill against a defendant claiming possession, and threatening to come upon the estate, and cut up sods, deal, and other timber, and the Court granted a perpetual injunction to restrain him from so doing, with costs (7).

Metropolitan
Building Act,
1855.—Adjoin-
ing owner.

2. A tenant in possession, having an equitable interest only, under an agreement for a lease for a term is, in Equity, an

(1) *Aldis v. Fraser*, 15 Beav. 215.

74; 16 W. R. 928.

(2) *Cary*, 2; *S. P.*, *Dolman v. Vavasor*, 1b. 92.

(4) *Lowndes v. Bettie*, 10 Jur. (N. S.) 226; 12 W. R. 399.

(3) *Eyton v. Denbigh, Ruthin, and Corwen Railway Co.*, 38 L. J. (Ch.)

(5) *Ib.*
(6) *Ib.*

(7) *Ib.*

adjoining owner under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), and three months' notice must be given to him before any alterations affecting his premises can be commenced by his neighbour under the powers of that Act (1).

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3. Where, by a grant or patent, dated in 1801, the then Bishop of Ely, having, as the grant stated, "confidence in the probity, fidelity, care, and industry of P.," granted to P., who was a solicitor, "the office of receiver of all issues, profits, sum and sums of money, arising and issuing" from the possession of the see, to hold to P., by himself or his sufficient deputy or deputies, to be approved of by the bishop and his successors, for his life, and the office of receiver was an ancient office, and had been exercised before the restraining Statute of 1 Eliz. c. 19, and P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewal of leases, and prepared the leases of the see, and likewise attended all searches for records in the bishop's muniment room, of which he kept a key, for the performance of which acts he received fees and emoluments, and it appeared also that his predecessor in office, who held the office since 1785, had done the same, and upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favour, and that he might be quieted in the possession of the office, and that the bishop might be restrained by injunction from obstructing the plaintiff in the exercise of such rights, and from doing acts in contravention of them. The Court held, first, that the plaintiff's claim was not of such a nature as to induce this Court to interfere to protect him, without being well satisfied (which the Court was not), that his legal remedy was insufficient to do him complete justice; and, secondly, that the relief sought being analogous to the specific performance of an agreement, the bill must fail on the ground of want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this Court against him, compelling their specific performance (2).

Grantee of
receivership of
a see.—No
injunction
against
successor of
grantor.

(1) *Corven v. Phillips*, 33 Beav. 18.

(2) *Pickering v. Bishop of Ely*, 2 Y. & C. Ch. 249.

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SECT. 2.

Judgment of
intrusion.

Grant of
conditional
order for
liberty to issue
injunction.

The old
practice of
granting
injunctions to
quiet posses-
sion after three
years' peace-
able posses-
sion.

4. Where the Crown had obtained judgment in an information of intrusion, which was more than a year old, the Court granted a conditional order for liberty to issue an injunction to put the Crown into possession, serving the parties in possession of the lands (1).

5. In *Vernon v. City of Dublin* (2) it is stated that it was usual in Ireland for a lessee, who had been three years in possession and was disturbed, to file his bill in the Court of Chancery there for an injunction to quiet him in possession till evicted by due course of law; and that this usage was founded upon the equity of the statutes made against forcible entries (3). But that it was necessary that all bills of this kind should allege, and also that it should be proved, that the sole and actual possession was in the plaintiff, and that no ownership or possession was in any other person (4). The practice of granting injunctions to quiet possession on the equity of having been in peaceable possession for three years before filing the bill formerly obtained in the English Court of Chancery; but the last case of that kind was *Hughes v. Trustees of Morden College* (5), decided in 1748, where an injunction was awarded "to quiet the plaintiff in such possession of the premises as he had at the time of filing his amended bill and three years before, until the hearing of the cause" (6). In this case the trustees had agreed with the commissioners of a turnpike to let them dig gravel in land which they had leased to the plaintiff for twenty-one years, and which he (a gardener by trade) had turned into a garden. The commissioners entered, took possession, dug up the *legumens* planted, set a value on them, and made a satisfaction, which the plaintiff accepted. The plaintiff moved for an injunction to restrain further digging, which, upon amending the bill, was granted, on the ground that the Turnpike Act, and all those relating to highways, *except* messuages, houses, gardens, orchards, yards, and planted walks, without limiting it to any particular kind of garden, which were as much taken out of their jurisdiction as if they had none, and that if the commissioners acted contrary they were as much trespassers as private persons,

(1) *Att.-Gen. v. Riggs*, 6 Ir. Eq. Rep. 17.

(2) 4 Bro. P. C. 393.

(3) *v. Stat.* 8 H. 6, c. 9, s. 7; 31 Eliz. c. 11, s. 3; and 3 Gwill. Bac. Abr. 249.

(4) *Vernon v. City of Dublin*, 4 Bro. P. C. 398.

(5) 1 Ves. Sen. 187.

(6) *Belt's Sup. to Ves. Sen. Rep.* 108.

and that they therefore acted without authority, and were in the case of private persons entering by force into the ground of which another had possession for twenty-one years; for which, indeed, there was a remedy at law, but that would be only for a particular wrong done, and not equal to the remedy in this Court, in seeking which the plaintiff was right, and had a proper head of relief, being in possession at the time of filing the bill, and three years before; the reason of which was, that the statutes of forcible entry required it, to extend which statutes the bill was brought for an injunction, for which the plaintiff had made a proper case, the amended bill being a case of above three years after making the lease.

And so in *Seymour v. Ryan* (1), and the other cases subsequently cited in this *placitum*, the injunctions were all granted on the same principle as in *Hughes v. Trustees of Morden College* (2). The exercise of the jurisdiction of the Court in granting injunctions against trespass in the nature of waste seems to have caused the practice of granting injunctions to quiet possession on the equity of having been in possession three years to fall into disuse; the relief against trespass in the nature of waste it is said, in *Drewry on Injunctions* (3), answers all the purposes of the injunction to quiet possession (4). *Flamang's Case* (5) came after *Hughes v. Trustees of Morden College* (6), and may be said to have laid the foundation of the modern doctrine on the subject, namely, that Equity enjoins in matters of trespass where irreparable damage is the consequence.

In *Seymour v. Ryan* (7) an injunction was awarded to restore and quiet the plaintiff and his tenants in possession of the premises in question; but it was at the same time ordered that he should appear to an ejectment brought by the defendant in order to try the title, and an ejectment was accordingly brought, and the defendant obtained a verdict, and was afterwards put into possession; but on an appeal by the plaintiff, it was ordered that he should be at liberty to bring an ejectment to recover possession of the premises, and that no mortgage should be set up in bar of his title.

(1) *Infra*.

Drewry, Ditto, 337; Kerr, Ditto, 603.

(2) *Supra*.(5) *v.* 7 Ves. 308, and 6 Ves. 147.

(3) Page 338.

(6) *Ante*.(4) *v.* Eden, Injunctions, 332, 335;

(7) 4 Bro. P. C. 390.

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In *Anon.*, Gilbert's Eq. Rep. (1), upon a bill to be quieted in possession of a right of common, and to prevent distresses, the defendants produced affidavits of fifty years' right of common and quiet possession; the Court would not interfere till after one or more verdicts at law. In *Lanesborough v. Elwood* (2), where an injunction was awarded by a decree, to put the plaintiff into possession of the premises in question, and at the same time the parties were directed to try the title at law, the decree was held by the Court of Appeal repugnant, and reversed as to the injunction. In *Sapoote v. Newport* (3) the Court granted an injunction for plaintiff's possession as at time of filing bill, and three years before. In *Stewart v. Stewart* (4), where, on a conviction before justices for a forcible entry, and a writ of restitution awarded by them, the record of the conviction had been removed by *certiorari* into the King's Bench, the Lord Chancellor, notwithstanding, granted an injunction to restore the plaintiff to his possession. In *Luttrell v. Irnham* (5), in a possessory bill in Ireland in Chancery, the setting up title in the defendant was held wholly inconsistent with the nature of the proceeding, any such claim of title being a matter to be made out by the defendant in a course of law, and the Court held that it would not delay the proceedings in the possessory bill on a suggestion in another bill (brought by the defendant against the plaintiff in a possessory bill) of an agreement under which the defendant claimed title, which was positively denied by the plaintiff in his possessory bill. In *Edgeworth v. Edgeworth* (6) it was held that on a possessory bill it was sufficient for grounding a decree for restitution to prove a triennial possession by virtue of a title still subsisting, though a defeasible one, and a forcible entry and retainer.

In *Fornley v. Clench* (7) it is said that where one party had been in possession fifty years, and possession had been proved just in Equity, the other party would have been prohibited by injunction from disputing his title in a Court of Law.

(1) Page 183.

(2) 4 Bro. P. C. 385.

(3) Cary, 47; *Douche v. Perrot*, Ib. 45; *Boles v. Walley*, Ib. 38; *Hawkes v. Champion*, Ib. 36-45.

(4) Wall. Lyn. 97.

(5) 7 Bro. P. C. 388.

(6) 2 Bro. P. C. 27.

(7) Cary, 23.

SECT. 3. *Canals—Water—Ferries.*PART I.
CHAPTER I.*Canals.*

1. Where the junction between two canals was effected by means of a series of locks, and whenever a boat passed through the locks a certain quantity of water flowed from the defendants' canal into that of the plaintiffs, and this had gone on for seventy years, and the defendants having attempted to interrupt this flow of water by pumping the water back to a higher part of their canal, Vice-Chancellor Sir John Stuart, on the ground of an implied grant of such a flow—the Legislature, by an Act, having directed a junction between the two canals, so that their respective levels made it necessary that there should be such a flow of water, and that therefore there was a grant—held that the plaintiffs could not be deprived of the benefit of the flow (1); but this decision was reversed by the Lords Justices, they holding that neither on the construction of the Acts and the agreements between the two companies, nor by the lapse of time, had the plaintiffs' canal acquired a right to the water so flowing, and that persons claiming to have acquired rights by prescription in the water of a canal have to meet the additional difficulty that these waters have been devoted by the Legislature to a special purpose (2); and the House of Lords held that the true construction of the Acts of Parliament cited failed to establish the claim under the parliamentary contract, and that no special agreement had been proved; but that had any such agreement or grant been at any time made by the company, it would have been *ultra vires* and unlawful, and that as no grant could at any time have been lawfully made, no prescriptive right by user could be claimed, or be deemed absolute or indefeasible, under the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2 (3). The doctrine as to use of water in natural or artificial streams does not apply to water passing through locks in a canal, such water being accumulated under the authority of the Legislature, to be used in a particular manner for the benefit

Canal,—no prescriptive right here to the water of, and grant of, would have been *ultra vires*.

Difference between doctrine as to water in natural or artificial streams, and water passing through locks.

(1) *Staffordshire and Worcestershire Canal Navigation Company v. Birmingham Canals Navigation Company*, 13 W. R. 130.

(3) *Staffordshire and Worcestershire Canal Navigation Company v. Birmingham Canals Navigation Company*, Law Rep. 1 H. L. 254.

(2) 1b. 11 Jur. (N. S.) 71.

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of the public (1), and the water passing from the opening of the lock of a canal does not constitute a watercourse within 2 & 3 Will. 4, c. 71, s. 2 (2).

Water is only allowed to be taken from a canal for the purpose authorized,

2. Parties authorized to take water from a canal for one purpose, will not be allowed to take it for another, and where, by a Canal Act, millowners were empowered to use the canal water merely for "condensing" steam, and in 1829 the defendant, being about to erect a mill, applied to the plaintiff for leave to take water for "generating" as well as "condensing," and the company did not appear to have refused the application, and the pipes were laid down in the presence of their engineers, the mill being built on the principle of using the canal waters for both purposes, and having been used in that way down to 1847, when disputes arose, and an action was brought by the company, who recovered 1s. damages, but the defendant continued to take the water; the Master of the Rolls, although the company's right had been established at law with damages, held that the smallness of the damages would not prevent the Court interfering, but that they were bound by their acquiescence, and refused a perpetual injunction to restrain the defendant from taking water for the purposes of "generating" steam (as well as "condensing") (3). However, an injunction was granted against the defendant as to another mill, acquiescence and encouragement on the part of the company not having been established (4).

unless there be acquiescence for another purpose.

A mandatory injunction to take down a wall across a part of a canal refused (here), but company enjoined doing more.

3. Where a railway company had become owners of a canal by purchase, and were bound, by several statutes, to keep it open and navigable, and the plaintiff was the owner of a mill abutting upon a sort of bay in the canal, which he alleged formed part of the canal itself, but this fact was denied by the defendants, who built a wall across the bay, so as to make the canal of the same width here as in other parts, and the plaintiff filed his bill for an injunction to make the defendants undo what had been done, and to prevent them from doing more; the Court held that it could not make the defendants undo anything done, but that the plaintiff

(1) *Staffordshire and Worcestershire Canal Navigation Company v. Birmingham Canals Navigation Company*, L. R. 1 H. L. 254.

(2) *Ib.*

(3) *Rochdale Canal Company v. King*, 16 Beav. 630; 17 Jur. 100; 22 L. J. (Ch.) 604; 2 Sim. (N. S.) 78; 20 L. J. (N. S.) (Ch.) 675; 15 Jur. 692.

(4) *Ib.*

was entitled to an injunction to restrain them from proceeding to do more, the plaintiff undertaking to bring an action at law to try the disputed right (1).

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4. Persons, being commissioners for drainage and other purposes, authorized by Act of Parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, were not restrained from cutting through their own lands, at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to Parliament for farther powers to levy money (2). But persons authorized by Act of Parliament to cut a canal, if their funds are insufficient for completion of undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding (3).

Commissioners under an Act not restrained cutting canal pending application to Parliament for further powers to levy funds.

But restrained by landowner upon insufficiency of funds.

5. An order specifically to repair the banks of a canal and stop gates and other works, was, in *Lane v. Newdegate* (4), refused. But by an injunction restraining the defendant from impeding the plaintiff from navigating and using, by continuing to keep the banks, &c., out of repair, the effect of such an order was obtained.

6. Where an Act, the Monmouthshire Canal Act, provided that upon auxiliary railroads made by private individuals under the authority of the Act, the tolls should not exceed the rate charged by the canal company, which for the articles of ironstone and limestone was restricted to $2\frac{1}{2}d.$ a ton per mile, and it also empowered the canal company itself, by agreement with the landowners, to construct auxiliary railroads on which tolls not exceeding $5d.$ a ton per mile might be charged, and certain landowners and owners of ironworks, and among others the assignees of the Beaufort works, formed a joint company, and, under the powers given by the Act, constructed a railroad, connecting a lime quarry called the Trivil quarry with the several ironworks, and with the railroads of the canal company, and in the partnership deed of the railway company the lessees of the Beaufort works covenanted with the other shareholders, so long as the covenantors, their executors,

(1) *Bradbury v. Manchester, Sheffield, and Lincolnshire Railway Company*, 15 Jur. 1167.

(2) *Mayor, &c., of King's Lynn v. Pemberton*, 1 Sw. 244, 250.

(3) *Ib.*

(4) 10 Ves 192.

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administrators, or assigns, should occupy the Beaufort works, to procure all the limestone used in the said works from the Trevil quarry, and to carry all such limestone, and also all the ironstone, from the mines to the said works along the Trevil railroad, and to pay a toll of 5*d.* a ton per mile for the same, the Court, upon a bill by the shareholders of the Trevil railroad for an injunction to enforce the covenant against a person who had purchased the Beaufort works with notice of the partnership deed, held, that the covenant securing a toll of 5*d.* a ton per mile to the shareholders of the Trevil railroad was a fraud upon the canal company and the Legislature, and therefore ought not to be specifically enforced by injunction (1).

7. Where a canal company pumped foul water into their canal so as to make the canal a nuisance, it is no defence that the foulness was caused by other persons (2).

8. In *Birmingham Canal Company v. Lloyd* (3) an injunction was refused against draining preparatory to opening a coal mine, with prejudice to a canal, before establishing the right at law, upon the ground of laches for two years, and permitting expenditure.

The Court
can wind up
a canal com-
pany.

9. The Court has jurisdiction under the Companies Act, 1852, s. 199, to wind up a canal company incorporated by Act of Parliament, and will make a winding-up order in such a case although it may be necessary to apply for an Act of Parliament to enable the property of the company to be sold; and a canal company, whose canal had been disused for three years, in consequence of an injunction of the Court of Chancery restraining the company from supplying the canal with water from a stream which had become polluted, and of the impossibility of obtaining a supply of water from any other source without incurring very great expense, was ordered to be wound up on its own petition (4). From this decision another canal company, which had a statutory right to use the former company's canal, appealed; but as this canal company were neither creditors nor contributories of the former company,

Canal re-
strained
pumping in
foul water
creating a
nuisance.

(1) *Keppell v. Bailey*, 4 My. & K. 517; 8 C. Coop. t. Brough. 298. *Graham*, 7 Ves. 307, 308.

(2) *Att.-Gen. v. Bradford Navigation Company*, 35 L. J. (Ch.) 619. *In re Bradford Navigation Company*, Law Rep. 10 Eq. 331; *Att.-Gen. v. Bradford Navigation Company*, 35 L. J. (Ch.) 619.

(3) 18 Ves. 515; *et v. Weller v. Smeaton*, 1 Bro. C. C. 572; *Hanson v.*

Lord Justice James held that the appellants had no *locus standi*, and that their rights in regard to the first company's canal would not be affected by the winding-up order (1).

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10. Where the defendant was the owner of a canal, of which the plaintiffs were large customers, and a mutual understanding had been come to between the parties, that so long as the plaintiffs remained good customers of the canal they should be allowed to use the superfluous water of the canal for the purposes of copper-works, of which they were occupiers under an agreement for lease with the defendant, and it was shewn that the use of the water of the canal, though convenient and economical, was not absolutely essential to the plaintiffs' works, Vice-Chancellor Sir W. M. James held that such an understanding did not form the foundation of an equitable right, but it would have been otherwise if the plaintiffs, with the knowledge of the defendant, had incurred expense in establishing a manufacture for which the use of the water was absolutely necessary (2).

Mutual under-
standing
(here) no
foundation of
an equitable
right.

11. There is a public right of user of a canal with boats propelled by steam power in navigating public canals, provided that it occasions no more than the ordinary injury to the canal which is occasioned by traction by horses (3), and in this case experiments were directed to be made by a civil engineer to ascertain the effect of steam navigation on a canal, and the Master of the Rolls, after the experiments had been made, granted a perpetual injunction at the suit of a company, as carrier, to establish their right of user of the canal with steam power, to restrain a canal company from preventing a railway company using steam power on the canal, the railway company undertaking not to exceed a speed of three miles an hour (4).

Public right of
user of canals
with steam
power.

12. Where a Canal Act empowered the proprietors of mines, and their lessees, to make railways or roads across the lands of other persons intervening between the mines and the canal, to convey their minerals to the canal; and in 1843 an agreement had been entered into between the lessees of coal mines and the owners of intervening lands, to make a tramroad across them, subject to an

(1) *In re Bradford Navigation Com-
pany*, 18 W. R. 1093.

(3) *Case v. Midland Railway Com-
pany*, 27 Beav. 247; 5 Jur. (N. S.)

(2) *Bankart v. Tennant*, Law Rep. 1017.

10 Eq. 141.

(4) *Ib.*

[illegible]

... and ... (U.S.) ... company, ...

14. There has been several years' acquiescence in action was brought against him, where he used water for other purposes than condensing, and damages recovered. It was held that the plaintiffs were estopped by acquiescence from restricting the defendants' rights to the purpose of condensing only, and a perpetual injunction was refused. 31.

It det.

15. The Master of the B.M.s (Lord Romilly), intimated in *Ethwell v. Crouther* (†) that an owner of freehold lands and his lessee would be restrained from working mines under a water-course otherwise than in a manner not likely to prevent the plaintiff from enjoying an uninterrupted flow of water to his works. But as to the freeholder and his lessee undertaking not to work the

(8) *Rochdale, &c. v. King*, 21 Eng. Law & Eq. 177 (Amr.) (*ante*, p. 10).

(4) 31 Beav. 163; 8 Jur. (N. S.) 1004; 31 L. J. (Ch.) 763.

mines so as to interfere with the flow of water to the plaintiff's works, or to diminish the supply, further proceedings were stayed, with liberty to the plaintiff to apply, but giving no costs.

In this case the plaintiff was entitled, for the purposes of his mill, to a supply of water by means of a stream running through and over the lands of the defendant, and the defendant, in working the minerals lying under the bed of the stream, had caused a subsidence both of the bed of the river and of the adjoining land to the extent of four feet, for some distance, and, in order to maintain the original level of the stream, the defendant had constructed embankments on either side, but there was no actual diminution in the supply of water to the mill. Upon a bill for an injunction, the Court refused to make a hostile decree against the defendant, but, by reason of the subsidence which had taken place in the bed of the stream, he was required to give an undertaking not to work the minerals in such a way as to obstruct or interfere with the flow and passage of the water to the mill.

16. In the absence of any allegation of prescriptive right in the plaintiff, the Court refused to restrain the draining of gravel pits into a stream to the injury of watercress beds of the plaintiff, supplied by such stream (1).

17. The Lords Justices, affirming a decree of Vice-Chancellor Sir J. Stuart, decided that a claim by the plaintiff to use water which flowed from his land to the land of the defendant, and was there collected in a reservoir, whence it reflowed into the plaintiff's land, and a claim also by the plaintiff to the overflow into his land of a pond which flowed through the defendant's land into that of the plaintiff, the claim not being supported by evidence of twenty years' user, nor by shewing that there had not been an interruption for one year before filing the bill, could not be maintained (2). But they held, that the plaintiff was entitled to water flowing from surface springs on the defendant's lands, and on neighbouring lands in which the defendant had cut trenches, and which naturally flowed, but not through perfectly defined channels, into the plaintiff's lands, and was entitled to an injunction to restrain the defendant from diverting it, on the ground that an occupant is not

(1) *Weeks v. Heward*, 10 W. R. 557.

(2) *Ennor v. Barwell*, 2 Giff. 410; 4 L. T. (N.S.) 597; 6 Jur. (N.S.) 1283.

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annual rent of £5 5s., and the lessees afterwards abandoned the tramroad, and, without any consent except that of the tenant, made a railroad across the lands in a different direction from the tramroad, and they had also erected an engine-house for which they subsequently agreed with the mortgagee in possession to pay an additional rent of £1 15s., and the defendant subsequently became owner of the lands and gave notice to the lessees that he should require an annual payment of £35, and the lessees refusing to pay that sum he gave them notice to cease the use of the railway, and subsequently he took up the rails; upon a bill filed by the lessees, the Court held that the defendant was bound by the agreement and acts of his predecessors; that the abandonment of the tramroad for a railway had not affected the rights of the parties, and that the defendant was not justified in taking up the rails; and that the plaintiffs were entitled to restore them, the defendant being answerable in damages for the loss sustained by the plaintiffs (1).

Right of canal
to waste-way
into falls.

13. A canal company obtained an injunction to restrain an incorporated society located at the Falls of the Passaic (U.S.) from pulling down a gate and waste-way of the canal company, whose canal adjoined and was above the falls (2).

Acquiescence.

14. Where after several years' enjoyment, an action was brought against millowners for getting water for other purposes than condensing, and damages recovered, it was held that the plaintiffs were estopped by acquiescence from restricting the defendants' rights to the purpose of condensing only, and a perpetual injunction was refused (3).

Water.

Owner of
mines under
watercourse
restrained not
to interfere
with flow.

15. The Master of the Rolls (Lord Romilly), intimated in *Ellwell v. Crowther* (4) that an owner of freehold lands and his lessee would be restrained from working mines under a watercourse otherwise than in a manner not likely to prevent the plaintiff from enjoying an uninterrupted flow of water to his works. But upon the freeholder and his lessee undertaking not to work the

(1) *Mold v. Wheatcroft*, 27 Beav. 510.

(2) *The Society, &c. v. The Morris, &c.*, 2 Halst. Ch. 252; 1 Halst. Ch. 203 (Amr.)

(3) *Rochdale, &c. v. King*, 21 Eng. Law & Eq. 177 (Amr.) (*ante*, p. 10).

(4) 31 Beav. 163; 8 Jur. (N.S.) 1004; 31 L. J. (Ch.) 763.

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(1) *Weaks v. Heward*, 10 W. R. 557.

(2) *Ennor v. Barwell*, 2 Giff. 410; 4 L. T. (N.S.) 597; 6 Jur. (N.S.) 1283.

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entitled to intercept the natural flow of such water from surface springs. But, in order to ascertain the geological formation of the land, the plaintiff was not allowed to cut down an embankment or to remove the soil; but, on giving notice, he was allowed to enter and inspect it for the purpose of ascertaining the natural flow of the water (1).

18. Where permission had been obtained from E., the defendant, and other landowners, on behalf of a body of subscribers, to make a watercourse through their respective lands, to supply the town of G. with water, and it was alleged that the subscribers had agreed to pay to E., 2s. 6d. a year, but this was denied, and that the agreement was to pay "a proper and reasonable sum," and the watercourse was made, but no grant executed nor any sum arranged; and the defendant E. subsequently, after a nine years' user, stopped it up, and diverted the watercourse into the old channel; upon a bill filed by several of the subscribers the Court held, upon its being amended, and made on behalf of the plaintiffs, and others whose names and residences were unknown, being subscribers to the fund, that the plaintiffs were entitled to the use of the watercourse passing under the lands of the defendant E., and granted an injunction to restrain the defendant from preventing, obstructing, or interfering with the flow of water, or with the plaintiffs' use of the watercourse; and a reference was made to the Master to make a proper compensation (2).

Conditions
required to
restrain
infringement
of right by
long user to
use water of
stream for cer-
tain purposes.

19. Vice-Chancellor Sir R. T. Kindersley in *Wood v. Sutcliffe* (3), states the conditions required to induce a Court of Equity to grant an injunction to restrain the infringement of a right acquired by long user, to use the water of a stream for certain purposes; he says: "I conceive that if parties have established such a legal right as the plaintiffs in this case have established (in this case, at law, a right to use the water of a stream for washing wool and generating and condensing steam), and another person comes and erects works on the same stream, above their works, and by his manufacturing process so fouls the water of the stream as seriously and continuously to obstruct the effec-

(1) *Ennor v. Barwell*, 2 Giff. 410; (2) *Devonshire (Duke of) v. Eglin*, 14 4 L. T. (N. S.) 597; 6 Jur. (N. S.) 1283. Beav. 530; 20 L. J. (Ch.) 495.

(3) 2 Sim. (N. S.) 163.

tive carrying on of their manufacture; and if the granting of an injunction will restore, or tend to restore, those parties to the position in which they previously stood, and in which they have a right to stand; and if the injury complained of is of such a nature that damages will not be an adequate compensation, that is, such a compensation as will in effect, though not *in specie*, place them in the position in which they previously stood; and if, moreover (for there are several conditions), they use due diligence in vindicating their rights, they have, in general, a right to come to a Court of Equity and say: 'Do not leave us to bring action after action for the purpose of recovering damages; but interfere with a strong hand and prevent the continuance of the acts we complain of, in order that our legal right may be protected and preserved to us.' I say, in general, because whenever a Court of Equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry strict rights of the plaintiff and defendant, but also to the surrounding circumstances; to the rights and interests of other persons which may be more or less involved, before it exercises its jurisdiction—of granting an injunction. I have used the terms 'seriously obstructed,' because I cannot assent to the proposition, that, on the mere dry fact of the plaintiffs having the abstract right, a Court of Equity will, as a matter of course, on that right being established at law, grant an injunction, if the right be infringed ever so minutely. On the other hand, I am far from saying that because in the action at law the jury has given only a shilling or a farthing damages, *that* is a ground for concluding that the injury is not serious, and that the case is one in which an injunction ought not to be granted. I have used also the terms 'continuously obstruct,' by which I mean to indicate 'obstruction frequently recurring,' not 'never ceasing.'" In this case the Vice-Chancellor refused an injunction to restrain the discharge into a stream of filthy, noxious, or offensive substances, or foul waters, so as to render the water of the stream above, or at the plaintiffs' mills (they being worsted spinners), foul or unfit for the working of the mills—on the ground that they had not used due diligence in vindicating their rights; they having stood by whilst the defendants were constructing their works, and having suffered the defendants to use their works after

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they were constructed nearly five years, without giving them any hint that they were doing anything that they had not a lawful right to do.

20. In *Dewhurst v. Wrigley* (1) an injunction was granted against the obstruction of the flow of water through a goit in the defendant's lands to the plaintiff's mill. Where a mill-stream broke through the bank-meeting of the defendant's ground, and the stream was escaping into a new channel, and irreparable injury was to be apprehended, the Court made a conditional order before appearance to restrain the defendant from preventing the plaintiff, &c., from repairing the bank for the purpose of bringing back the stream into its proper channel, and also to restrain him from preventing the plaintiff from entering on that part of the lands in the possession of the defendant, which formed part of the bank of the stream, to repair the breach, and also to restrain the defendant from cutting, &c., any channel for the water of the stream on the lands in his possession whereby the watercourse might be diverted from the plaintiff's mill, unless cause shewn within six days (2).

Pending proceedings at law to try the right, defendant restrained.

21. Where, pending proceedings at law to try the right to a watercourse, the defendants were proceeding to take the law into their own hands, the Court held, that the plaintiff was entitled to file a bill for an injunction; but where the application for dissolving it, on the ground of the bill shewing a legal title acquired by lapse of time, had been refused, the Court said that it ought to make provision for having the question between the parties tried at law (3).

Principles upon which right to use water rests.

22. In *Wright v. Howard* (4), Vice-Chancellor Sir John Leach states the principles on which the right to the use of river water rests; he there says, "the right to the use of water rests on clear and settled principles. *Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and, consequently, no proprietor can have the right to use the water to

(1) C. P. C. 319.

(3) *Dewhurst v. Wrigley*, C. P. C.

(2) *M'Swiny v. Haynes*, 1 Ir. Eq. 329.
R. 322.

(4) 1 S. & S. 208.

the prejudice of any other proprietor without the consent of the other proprietors, who may be affected by his operations; no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back on the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years," the term of twenty years having been adopted, upon a principle of general convenience, as affording conclusive presumption of a grant.

23. The soil of the *alveus* is not the common property of the respective owners on the opposite sides of a river; the share of each belongs to him in severalty, and extends *usque ad medium filum aquæ*; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream. A fence or bulwark on the bank is allowable; but the *alveus* is sacred; and any encroachment by one proprietor may be resisted by the other; and the onus of proving that the act is not an encroachment falls on the party doing it, who is *primâ facie* held responsible; however, mere apprehension, without some show of injury, will not ground a complaint; but it is not necessary to obtain or to be guided by scientific opinions. *Per* Lord Westbury: "As far as I know this will be the first decision establishing the important principle, that an encroachment on the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor without the necessity of proving either that damage has been sustained, or that it is likely to be sustained from that cause" (1).

24. In *Ivimey v. Stocker* (2) it was held, that the plaintiffs not being entitled to work the mines by virtue of any estate derived from certain tin-bounders, and having themselves been in possession less than twenty years, had no prescriptive right to the use of certain water for mining purposes. In this case a tin-mine, which

(1) *Bickett v. Morris*, L. R. 1 H. L., Sc. 47; *et vide* *Lord Advocate v. Hamilton*, 1 Macq. 46. For the distinction between rivers navigable and rivers not navigable, shewing that the soil of the *alveus* in rivers navigable is in the Crown, *ib. n.* 49.

(2) 34 L. J. (Ch.) 623.

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had been immemorially worked by tin-bonders under the peculiar custom of the county, was abandoned in 1856, and from that period had been worked by the plaintiffs, who claimed to be the owners of the mine, but by what title it did not appear. The tin-bonders had immemorially used, for the purposes of their mining operations, the water flowing from an old artificial water-course, passing through the land of the defendants; and, upon the flow of the water therefrom being obstructed by the defendants the plaintiffs filed their bill to restrain the obstruction, which was dismissed with costs.

25. Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people, and the fact that the stream is fouled by others, is not a defence to a suit to restrain the fouling by one. The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without some evidence of an intention to abandon it; but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin, the Court held, that any right of fouling a stream attached to them was lost (1), actual disuser of an easement for twenty years, during which others have acquired adverse rights, destroys the right to the easement (2).

26. Where there is a prescriptive right to a riparian easement, the user which originated the right must also be its measure, and the easement cannot be enlarged to the prejudice of any other person (3).

27. The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river without shewing that the fouling is actually injurious to him, and where C., the occupier of print-works on the bank of the river, wishing to prevent the water of the river from being fouled by some dye-works, purchased from the owners of the dye-works a piece of land on the banks of the river, without communicating to them his object, the Lord Chancellor held, that in the absence of any express reservation by the owners of dye-works of the right of fouling, C. could maintain a suit to restrain them, and (with

(1) *Crosley & Sons v. Lightowler*, L. R. 2 Ch. 478; 36 L. J. (Ch.) 584; 16 L. T. (N. S.) 488; L. R. 3 Eq. 279.

(2) *Ib.*

(3) *Ib.*

variations) affirmed the decree of Vice-Chancellor Sir W. Page Wood (1). In this case the defendants were the owners of dyeing-works on a higher part of the stream, on the spot where a similar manufacture had formerly been carried on to a smaller extent, but had been entirely given up more than twenty years, and the Vice-Chancellor had granted an injunction to restrain the fouling of the river generally, and the Lord Chancellor, affirming the decree, held, that the owners of the land on which the dyeing-works had stood had, by giving up the works for so many years, lost any right which they might have had to foul the stream, but that the increase in size of the works would have made no difference.

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28. Mere non-user for less than twenty years of a privilege or of an easement to discharge foul dye-water into a stream is not in itself a proof of abandonment, which is a conclusion to be drawn from all the circumstances; amongst which the lying by and permitting others to incur expense in preparing to do that which, if continued uninterruptedly for twenty years, would destroy the easement, is a fact of great importance (2).

Mere non-user
for less than
twenty years
to foul a
stream—not a
proof of aban-
donment.

29. A riparian owner has a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream (3).

Riparian
owner's right
of complain-
ing of obstruc-
tion.

30. Though a river is polluted before it receives the drainage of a town, the landowners on the banks are entitled to restrain the further pollution; and where, by the Leeds Improvement Amendment Act, 1848, it was provided that the clauses of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), as to making and maintaining public sewers and the drainage of houses, should be incorporated with the Act, "except so far as they were inconsistent with the provisions of this Act, or were expressly varied or excepted by this Act;" and by sect. 6 of the Act the corporation of Leeds were authorized to construct one or more trunk or other sewer or sewers, sufficiently capacious to receive the foul and drainage water and filth of the town, and to convey the same into the river Aire. The Court of appeal held, affirming

Further
pollution
restrainable.

(1) *Crossley & Sons v. Lightowler*, L. R. 2 Ch. 478; 36 L. J. (Ch.) 584; 16 L. T. (N. S.) 438; L. R. 3 Eq. 279.

(2) *Crossley v. Lightowler*, L. R. 3 Eq. 279.

(3) *Norbury (Earl) v. Kitchen*, 15 L. T. (N. S.) 501.

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Pollution
restrained
after sixteen
years' opera-
tion.

a decision of Vice-Chancellor Sir W. M. James, that the power to drain into the river was controlled by sect. 24 of the Towns Improvement Clauses Act, and also by sect. 107, though that clause was not expressly incorporated in the local Act; and that the corporation were not authorized by sect. 6 of the local Act to create a nuisance by draining into the river; and further, that, though the sewer had been completed and in operation sixteen years before proceedings were taken, the Court would interfere at the suit of landowners (1).

31. Continuing diversion of water from its natural bed is an irreparable injury, which Equity will redress (2). But in New York, both by virtue of an express statute, and because the claim is "wholly beneath its dignity," the Court will not enjoin a defendant from diverting a stream of water unless the annual injury to the plaintiff is equal to the interest of \$100, or the immediate injury amounts to \$100 (3).

Right to water
flowing (here)
a continuous
easement.

32. Upon a severance of tenements held by one owner, easements of necessity, or continuous easements, will pass by implication of law, without any words of grant; and where, in the year 1863, J., the owner of two adjoining properties, severed them by conveying one of them to W., and the other property became afterwards vested in K., and when the properties were in the hands of one owner there was a natural watercourse flowing from K.'s property to W.'s, and on K.'s property there was a tank which stopped the natural flow of the water in the stream, and an artificial culvert and pipes, which conducted the water from the tank to the yard of some cattle-sheds on W.'s property, and this artificial culvert was originally made expressly to supply these cattle-sheds with water, and W. had removed the cattle, but still claimed the right to the use of the water, the Lords Justices held, reversing a decision of the Master of the Rolls, that the flow of water along the artificial culvert from K.'s property to W.'s was a continuous easement, and that it consequently passed by implication of law to W. when his property was conveyed to him, and that he might use the water in any way he liked (4).

(1) *Att.-Gen. v. Leeds Corporation, &c., Factory*, 39 Barb. 311 (Amr.)
L. R. 5 Ch. 583.

(3) *Smith v. Adams*, 6 Paige, 435;

(2) *Tuolumne Water Company v. Hilliard* on Injunctions, p. 552, 2nd ed.
Chapman, 8 Cal. 392; *Corning v. Troy*,

(4) *Watts v. Kelson*, 19 W. R. 338.

33. Where the defendant diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channels before it reached the premises of the plaintiff, and the defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use; but he alleged that the water by the time it reached the plaintiff's lands was freed to the utmost possible extent from any noxious ingredient with which it had become impregnated, and it did not appear that any actual damage was sustained by the plaintiff, the Lord Chancellor, under these circumstances, dissolved an injunction which had been granted, restraining the defendant from diverting and using the water (1).

34. In *Robinson v. Byron* (2) an injunction was granted to restrain a defendant from preventing water flowing in regular quantities, as it had originally done, to a mill, the Lord Chancellor saying that he would not restrain what had been enjoyed for twenty years past; but if what had been so enjoyed was used in a different way, so as to do mischief, the Court might interpose.

35. In *Hammond v. Hall* (3) it is queried whether the owner of an old well can prevent his neighbour from sinking a well in his own land, on the ground that thereby the supply of water to the old well will be drawn off or diminished; but in *Womersley v. Church* (4), it was held by the Master of the Rolls that when a well is supplied with water which percolates through the earth, and does not flow through any defined channel, although the owner of the well is not entitled to the water until it actually enters his well, the occupier of adjoining property will be restrained from using a cesspool therein, in such a manner as to pollute the water coming through his property and supplying the well.

Ferries.

36. A right of ferry (being in derogation of the common rights of the public), rests upon the corresponding obligation on the part of the grantee of the right to maintain the ferry at all times for the use of the public, this obligation being enforceable by indict-

(1) *Elmhirst v. Spencer*, 2 Mac. & G. 45.

(2) 1 Bro. C. C. 588.

(3) 10 Sim. 551.

(4) 17 L. T. (N. S.) 191.

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ment and fine. But an Act of Parliament empowering a company (the Watermen's) to ply on Sundays from certain points on the south bank of the Thames, but imposing no obligation to provide means of transport, or to maintain their plying places, does not confer an exclusive right against the rest of the world, such as the Court of Chancery will interfere to protect, and upon a bill filed by a lessee of the company of the right of plying on Sundays from certain stairs to a certain point across the river, claiming a right of ferry, and seeking to restrain a new ferry which had been established fifteen yards from the ferry, Vice-Chancellor Sir R. T. Kindersley held, that if the plaintiff had the right he alleged he might come to the Court to quiet such a right, and would not be left constantly to insist upon the penalties imposed by the company's Act, and that the new ferry was so near the plaintiff's that the Court would have restrained it, but that the plaintiff's rights relating only to Sundays, and he being under no obligation to keep up the ferry, his right did not stand upon the same footing as an ancient ferry, and dismissed the bill with costs (1). On a motion to restrain a railway company, whose terminus was within the limits of an ancient ferry, from conveying passengers across the river in steamboats, the Court held, that although an Act of Parliament, which substituted a bridge for the ferry, gave the owner of the bridge no right against persons evading the tolls, yet, if he were entitled to recover penalties against offenders under the Act *de die in diem*, the Court would protect him by injunction from the infringement of his right, and that as no action could be brought under the Act by the plaintiff against the railway company, in respect of the alleged wrong, the Court would not simply leave the plaintiff to proceed by distress, in order that his legal right might be tried in replevin, but would direct an issue to try such right, and require the defendants not to raise any objection at law on the ground that the alleged wrong was done by a corporation (2).

37. An exclusive legal right ought to be protected, not only by

(1) *Letton v. Goodden*, L. R. 2 Eq. 123; 35 L. J. (Ch.) 427; 14 W. R. 554. *v. Tunstall*, Hard. 162, cited 2 Anstr. 608; *Hussey v. Field*, 2 C. M. & R. 432; see also *Campbell's Trustees v. Railw. Co.*, 3 Hare, 593; *Churchman Campbell*, 6 Pat. Sc. Ap. 417.

redress for the past, but in Equity, against violations of hourly repetition and interminable duration. Hence Equity will sustain a bill for an injunction where the owner of a public ferry loses part of his rightful profits by means of a ferry established near his, without right, but cannot procure proof to enforce his claim at law (1). The right of holding a ferry, with the privilege of taking tolls, is a franchise which the Chancellor will protect, not only by redress for the past but by restraining repeated disturbance; more especially will Equity interfere if the right has been established by judicial action (2).

SECT. 4. *Mines and Minerals—Quarries.*

1. Upon a conveyance of land for the express purpose that buildings, or other works, shall be erected upon it, the right of working minerals being reserved to the vendor, the purchaser is entitled to support from the adjacent and underlying soil, not only for the surface land, but for the buildings erected upon it; and this right is not affected by the circumstance that the conveyance is to a company taking the land under compulsory powers, and not from the vendor voluntarily (3). But although the purchaser is entitled to the natural support of the soil, he cannot rely upon the permanence of a merely accidental state of circumstances for which he has not stipulated; therefore, although a vendor will be restrained from working the mines underneath or adjacent to the land purchased, so as to cause any injury to the surface and superincumbent works, the purchaser cannot, in the absence of any contract, compel him to keep the mine filled with water, to the exclusion of any future working, notwithstanding that it has been in this drowned, abandoned condition for forty years before the time of the purchase (4).

The purchaser of lands for buildings is entitled to natural support from adjacent and underlying soil, notwithstanding the right of working minerals is reserved.

But purchaser cannot compel vendor to keep a drowned mine filled with water.

2. A bill will lie by an equitable owner of an estate, held under a copyhold manor, to restrain a lessee of the coal mines under the equitable owner of copy-

(1) *Long v. Beard*, N. C. Term R. 256; *McRoberts v. Washburne*, 10 Min. 23; 16 B. Mon. 699.

(2) *Newport v. Taylor*, 16 B. Mon. 699 (Hilliard, Inj., 536, 2nd ed.)

(3) *North Eastern Railw. Co. v. Elliott*, 6 Jur. (N. S.) 817; affirmed *sub. nom. Elliott v. North Eastern Railw. Co.*, 10 H. L. C., 333.

(4) *Ib.*

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holds can
restrain using
a tramway,
under his
ground.

Restraining
cutting of coal-
barriers—
upon *prima*
facie trespass,
and no affi-
davits of
defendant—
inspection
ordered and
interim in-
junction.

manor from conveying coals, by means of an underground tramway, from under an estate A., of which the lessee was the owner, through the estate of the plaintiff, to the surface of the lessee's colliery at W., so held by the Court of Appeal, reversing a decision of Vice-Chancellor Sir J. Stuart, on a demurrer which he had allowed, on the ground that the plaintiff shewed no title to the place where the wrong was alleged to have been committed, and no possession of the subsoil in his estate (1).

3. Where, upon a motion by occupiers of coal mines, for an injunction to restrain the defendants, who worked adjoining mines, from cutting into the plaintiffs' barriers, the defendants offered an undertaking, and asked for time to answer affidavits, the Court refused adversely to order an inspection of the defendants' mines (2). But upon the plaintiffs renewing the application a week later, making out a *prima facie* case of trespass, the defendants having in the meantime filed no affidavits, the Vice-Chancellor Sir R. T. Kindersley having no certain plan of the workings, granted an *interim* order, and an order to inspect (3).

4. There is a *prima facie* inference at Common Law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words shewing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et formá*, and with the natural support which it possessed before the demise, and an inquiry was directed upon this principle, with a view to an injunction (4). In this case a lessor had demised for sixty years, at certain rents and royalties, the following parcels, viz., first and secondly, certain cottages and engine-house; thirdly, all the mines which then were, or thereafter during the term might be, discovered within all the lands, about 514 acres, described in the map; and also liberty for the lessee to dig, and carry, and sell iron and coal, in, from, over, upon, or under the lands, and to open and dig any

(1) *Bowser v. Maclean*, 6 Jur. (N. S.) 1220; 2 De G. F. & J. 415.

(2) *Whaley v. Brancker*, 10 Jur. (N. S.) 535.

(3) *Ib.*

(4) *Dugdale v. Robinson*, 3 K. & J. 695; 3 Jur. (N. S.) 687.

pits or levels into, upon, about, or under the mines and lands, except in or upon the demesne lands coloured red in the plan (being a piece of four acres), on which a capital mansion-house and buildings were erected, Vice-Chancellor Sir W. P. Wood held that this was a demise of the whole mines under the whole 514 acres, but with a restricted right of enjoyment in the lessees, so that the lessor could not demise the red part to any other persons, but the lessees had no right to work the mines under the red. The lease provided, that in so much of the land as was coloured yellow in the map (being a portion entirely surrounding the red portion), the works were to be carried on at the farthest point possible from the mansion-house, and the lessees bound themselves to commit no unnecessary waste or damage. The lessees had, however, slightly worked under the red, and damage had thereby accrued to the mansion-house, the Vice-Chancellor held that the plaintiffs were entitled to an inquiry whether any, and what, portion of the lands comprised in the indenture of demise, other than the portion coloured red, afforded such support to the mansion-house, offices, and buildings, as to render it necessary that the same should be left undisturbed for the purpose of such support.

5. The land in the above case was at the date of the lease (in 1842) mortgaged in fee; the mortgagor and mortgagee joined in the mining lease. In 1856 the mortgage was transferred to the plaintiff, with a restriction against their calling in the mortgage-money until 1863, the Vice-Chancellor held that they might sue to restrain damage to the mansion-house from the working of the mines (1).

Assignee of the mortgage in fee, may restrain damage by the lessee from working the mines.

6. Where in a suit for an injunction to restrain the defendant from making a drift from his colliery, which would have the effect of conveying water from his colliery to the colliery of the plaintiff, an injunction was granted, and the bill retained for a year, with liberty for the plaintiff to bring such action as he might be advised; and the plaintiff brought his action on the case for damages, but failed in the action in consequence of its appearing from the evidence that, by the plaintiff having ceased to work his engines before the making of the drift, the water in his own colliery had risen above the level of the water in the defendant's colliery, and

Where no injury is to be apprehended from a drift, injunction refused.

(1) *Dugdale v. Robinson*, 3 K. & J. 695; 3 Jur. (N. S.) 687.

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the plaintiff therefore failed in proving actual damage, but the question as to the legal right to make the drift was not decided, and the answer stated that the drift was completed, and that no injury had arisen to the plaintiff, Lord Chancellor Cottenham refused to direct an issue or a special case, and dismissed the bill, no injury from any further acts of the defendant being to be apprehended (1).

Lessee of coal mines restrained (here) removing coal pillars, to the detriment of lessee of alum mines in coal wastes.

7. Where a lease of alum mines gave the lessee the right to obtain alum from certain coal wastes, and a subsequent lease of the coal mines, provided that nothing thereby granted should injure the rights of the parties who held the alum mines, and the alum existed in the coal wastes, and the coal lessees could not thoroughly work the coal without moving the pillars which supported the roof; but by doing this the alum would be rendered impossible to be reached, the House of Lords held that the coal pillars could not be removed (2).

Injunction granted prohibitory in form—mandatory in effect—to compel lessee to close communication with adjoining mine.

8. In *Measborough (Earl of) v. Bower* (3), the Court granted an injunction prohibitory in form, but mandatory in its effect, against a lessee, tenant of a coal mine, acting in contravention of the covenants, the tenant being restrained on motion from permitting a communication with an adjoining mine to continue open, and water to flow therefrom, the effect intended being to compel the defendants to close the communication.

Interlocutory injunction granted (here) though defendant denied the lands were copyhold.

9. In *Greenwich Hospital (Commissioners of) v. Blackett* (4), where the plaintiffs stated on their bill that certain lands were copyhold, but did not allege circumstances sufficient to prove that they were so, and that B., the tenant, had never worked mines, although B., by his answer, said the lands were freehold, and denied that they were copyhold, yet the Court granted an interlocutory injunction to restrain B. from working mines till the hearing.

10. Where the lands of A., on which there was an open quarry of limestone at the time of the demise, were demised for the term of three lives, renewable for ever, reserving to the lessor and his heirs all royalties, the lessee was restrained by injunction from

(1) *Duke of Beaufort v. Morris*, 2 Ph. 683; 6 Hare, 340; 14 Jur. 60.

(3) 7 Beav. 127.

(2) *Earl of Glasgow v. Hurllett Alum Company*, 3 H. L. C. 25.

(4) 12 Jur. 151.

raising the limestone for sale (1); and where a tenant for lives renewable for ever, having demised for years part of the lands upon which there was at the time an open quarry, which he was in the habit of working for sale, without any reservation or exception in the sub-lease, the Court held the sub-tenant was not entitled to work the quarry for sale, and that his landlord had the right to enjoin him, and there is no analogy between open quarries and mines (2).

11. Where the lord of a manor who claims against the tenant the right of property in the mines within the manor, has stood by for a long period, and has allowed the tenants, without objection, to work the mines and expend large sums of money upon their mining operations, the Court—although relief by injunction is not excluded from these cases—will not assist him by making a decree for an injunction against the tenants, but will leave him to his legal remedy (3). The Court will not restrain the working of mines permitted during eight years without directing an action (4).

12. Where the lessees of a colliery having agreed to grant to the lessees of a neighbouring colliery license to use a right of way enjoyed by the former, and the owner of the first colliery having granted to the second lessees the same right of way during a term of years, and afterwards, by assignment from the first lessees, become possessed of the first colliery, and the right of way, an injunction was granted to restrain him from removing the materials and destroying the way (5).

13. The Court granted an injunction (in this case with a view to giving the opportunity of trying the question, whether the lord could, without a special custom, open a mine, at Common Law), to a copyholder, to restrain the lord preparing to open a mine by erecting sheds and engines, &c., the Lord Chancellor acquiescing in the view that as it would be very unwilling to interfere where a mine had been opened and was actually in a working state, on the ground that the consequence might be irreparable mischief, so it

Lord of manor standing by a long period and allowing tenants to work and spend money on mines—not assisted with injunction.

Reversioner—merging original lease, restrained depriving sub-lessees of licence to use a right of way, granted and enjoyed by original lessee.

(1) *Parcell v. Nash*, 2 Jones, 116.

(2) *Mansfield v. Crawford*, 9 Ir. Eq. R. 271.

(3) *Parrott v. Palmer*, 3 My. & K. 632 (*et v. Richards v. Noble*, 3 Mer.

673, overruling *Dench v. Bampton* before Lord Loughborough, 4 Ves. 700).

(4) *Field v. Beaumont*, 1 Sw. 208.

(5) *Newmarch v. Brandling*, 3 Sw.

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would, on the same ground of irreparable mischief, interfere by injunction to restrain the opening, or preparing to open, a mine (1), but the Court, on a subsequent motion to dissolve the injunction—the plaintiff having failed in consequence of a mistake in his pleadings at Law in the action to obtain a trial on the merits—declared that unless some means of procuring a speedy trial could be insured, it would dissolve the injunction (2).

14. The Court will grant an injunction, where the defendant has begun to take coal in his own land, from working into the land of the plaintiff (3).

15. If a person only threaten to open mines, the plaintiff may come into Court to restrain him from doing it (4); nor is it necessary to stay till waste is actually committed, where the intention appears, and the person insists on his right to do it (5). And if a bill is brought by a reversioner against a tenant for life, though no proof appears of waste, yet if tenant for life insists on a right to do it, and it is proved he has none, the Court will grant the reversioner an injunction (6).

Tenant for life may open new pits for working old veins.

16. A tenant for life of coal mines may open new pits or shafts for the working old veins of coals, for it is hazardous to grant an injunction to stay the working of a coal mine, as it may ruin the colliery for ever. So, where one seised of lands, wherein there are coal mines not opened, settled those lands on A. in tail, remainder to B. for life, and A. subsequent to the settlement opened the mines and worked them and died without issue; B. may continue to work all the mines lawfully opened by the precedent tenant in tail though opened subsequent to the settlement (7).

17. Where the rights of the plaintiff and the defendant are legal, the plaintiff, in asking for an injunction to protect him from a violation of his alleged legal right, ought to shew that the right has been established; or that, having had no means of establishing it, but the right being *prima facie* well founded, the interference of this Court is necessary to prevent that species and extent of mis-

(1) *Grey v. Duke of Northumberland*, 13 Ves. 236 (*v. Player v. Roberts*, Sir W. Jones, 243, as to the right of opening a mine by the lord).

(2) *Grey v. Duke of Northumberland*, 17 Ves. 281.

(3) *Mitchell v. Dora*, 6 Ves. 147.

(4) *Gibson v. Smith*, 2 Atk. 182.

(5) *Ib.*

(6) *Ib.*

(7) *Clavering v. Clavering*, 2 P. Wms. 388; S. C. Sel. Ch. Ca. 79.

chief which this Court calls irremediable, before the right can be established by legal proceedings (1). In this case a motion had been made by the plaintiff in the cause, before the Master of the Rolls, that the defendant might be restrained by injunction from mining beneath the plaintiff's two messuages and lands mentioned in the bill, or in the vicinity thereof, in such a manner as in any way to damage or endanger them or their foundations; and the Master of the Rolls having simply refused the motion, it was now renewed, by way of appeal, before the Lord Chancellor, who also refused the injunction under the circumstances, but on condition of the defendants making certain admissions for the purpose of enabling the plaintiff to bring an action, although there was reason to apprehend that if the working was continued, the plaintiff's houses upon the surface would be totally destroyed or irreparably damaged before the legal right could be decided; the Lord Chancellor saying that the plaintiff's injury, if he sustained it, and ought not to have sustained it, would be, to a great extent at least, capable of reparation; that it was a mere question of the value of the property, which must be compensated; whereas by no possibility could the injury done to the lord be compensated, if he were prevented for a considerable length of time from exercising a right which, in a certain event, might turn out to be his to the full extent to which he claimed it; and having already observed that the stopping the working of a mine was a thing which of all others this Court was most averse to do, though it might under certain circumstances be compelled to do it, and the Court with reluctance grants an injunction to stay working a colliery (2).

18. In *Parrot v. Palmer* (3), Lord Brougham points out the distinction between the cases in which the right to an account is incident to an injunction, and those in which it is independent of that relief, and the peculiarity of the cases of mines in this respect. He there says: "Whether the former of these species of relief (i.e. account) can be granted where the latter (i.e. injunction) is not competent, is a question which has been oftentimes agitated, and has perhaps never received a clear and general decision; that is to say, a distinct judgment on the general proposition, with its

(1) *Hilton v. Lord Granville*, 4 Beav. 180; Cr. & P. 283.

(2) *Anon.* Amb. 209.

(3) 3 My. & K. 632.

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limitations. But it may be laid down generally, that, unless in the case of mines, the rule is—no injunction, no account.” And further on he says: “From the whole (of the cases noticed by him) it may be collected that although, as to timber, there exists considerable discrepancy, yet the sound rule is to make account the incident and not the principal, where there is a remedy at Law (1); but that mines are to be otherwise considered, and that, as to them, the party may have an account even in cases where no injunction would lie.” And then he says, “that even if it had been otherwise, even if the rule had been that there could be no account of mines in a case where no injunction lay, the rule would have had no application to the present case (2). That rule is, not that in any particular instance where, from accidental circumstances, the party fails in obtaining an injunction he cannot have an account; it is only that where, from the nature of the question, injunction is not competent and could not be prayed, as where the waste has been committed by a former tenant, and his lease is out, or his term assigned, and consequently there is nothing to restrain, no account will lie.”

19. An injunction to restrain the working of a quarry was granted to a tenant for life by Vice-Chancellor Kindersley as against a defendant claiming under a lease from the other defendant, for the purpose of working the freestone contained under the soil, and not denying the fact of his having worked, although the plaintiff's evidence did not distinctly prove this defendant's participation in the act of working complained of (3).

Right of support is incident to grant or demise—cannot be taken away except by clear indication of intent.

20. The right to support is incident to a grant or demise of the surface and cannot be taken away except by a clear indication in the instrument of such an intent. Therefore, where a lease of waste land of a manor, contained an exception in favour of the lessor (the lord of the manor) of the mines and quarries under the devised property, with full power to win and work, and also with free wayleave and passage on foot or horseback, with carriages to, from, and along the same, and the lessor covenanted, in working the mines and using the privileges and liberties reserved, to do as little damage and spoil to the soil and herbage as possible, Vice-

(1) *v. Bailey v Taylor*, 1 Russ. & My. 73.

(2) *Parrott v. Palmer*, *supra*.

(3) *Bell v. Wilson*, 34 L. J. (Ch.) 572.

Chancellor Wood held, first, that the lessor and those claiming under him were entitled to the absolute wayleave or use of an underground right of way, which might be used for the purpose of working minerals not under the demised property, and not merely to a right restricted to the purpose of working the mines under the demised premises; but that the lessor was not entitled so to work the reserved mines as to let down the surface (1).

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21. The title to an easement by prescription must be deduced either through the ancestors, or through the predecessors in title of the claimant. The estate of the bounders, under the custom of Cornwall, is in no way derived from that of the lord of the soil, or of the owner of the minerals, but is adverse to them; and upon the determination of the estate of the bounders the lord or owner resumes the estate and rights his possession of which was interrupted. Therefore, though an easement by prescription may have been acquired by the bounders, yet on the determination of their estate the lord or owner does not step into possession of rights so acquired by them, but only returns to the enjoyment of the right he had originally. And where an ancient mine had from before the time of living memory been worked by tin-bounders, according to the custom of Cornwall, which enables any person to mark out a piece of waste ground the owner of which does not choose to work the mines under it, and work them without the consent of the owner, yielding to the owner a share of the proceeds; and the bounders had from before the time of living memory used for the purpose of their works the waters of an artificial watercourse arising in the land of another person; and the bounders abandoned the mine in 1856, since which the owners of the minerals had been in possession; and the bounders in working this ancient mine had thus acquired a right by prescription to the use of water flowing through an artificial channel, and had begun to work it; a bill filed by owners to restrain the diversion of the watercourse by the owner of the land in which it rose was dismissed by Vice-Chancellor Kindersley, on the ground that there was no privity of estate between the owner and the bounders, and that the owner, therefore, could not claim an easement by prescription on the ground of their enjoyment of it. But, on appeal, the Court held that an injunction

Title by prescription must be deduced through ancestors or predecessors—Estate of tin-bounders is not derived from lord—The lord does not succeed to prescriptive rights of former bounders—But (here) right to use waters of artificial watercourse to be presumed between owner of mines and of bounders.

(1) *Proud v. Bates*, 10 Jur. (N. S.) 441; 34 L. J. 406.

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ought to be granted, for that it ought to be presumed that a right to use the waters had been acquired by arrangement with the owner of the mine and minerals as well as with the bounders (1). And, *semble*, that where an easement has been enjoyed from time immemorial by persons exercising rights in the dominant tenement, although such rights are not derived from the owner, and are, to some extent, adverse to him, yet, in the absence of express proof as to the origin of the easement, the presumption is that it belongs to the land and not to the persons exercising such rights (2).

Power (here) reserved to Crown to grant subsequent "galees" of lower veins of coals, right to sink shaft through upper galed veins.

22. Where, by virtue of an award made by the commissioners under the 1 & 2 Vict. c. 43, the plaintiffs were "galees" of a section of upper veins of coal in the Forest of Dean; and by the rules attached to the award, any underlying veins not galed "might be galed to other parties; but to be so worked as not to impede or injure the working of the tracts already allotted, or thereafter to be allotted or galed." The Court held, that the rule reserved to the Crown the power of granting to subsequent galees of the lower veins a right to sink a shaft through the upper veins previously galed, and that the restriction as to the mode of working must be so construed as not to render the reservation nugatory, *i.e.*, as a restriction only upon the mode of working the lower seams, when reached, and not as limiting the right of the Crown to grant liberty to sink a shaft through the upper veins in order to reach the lower (3).

The right to coal under customary freeholds is same as in copyholds, and in absence of custom tenant no right to work the minerals.

23. The right to coal under customary freeholds is the same as in the case of lands of ordinary copyhold tenure. The onus lies on the tenant of customary freeholds to prove that he has the right by custom to dig for coal under his lands of that tenure, and in such lands, *i.e.*, such as are held by copy of court roll, not at the will of the lord, but according to the custom of the manor, the freehold is in the lord, and in the absence of custom (the onus of establishing which lies upon the tenant) the tenant has no right to work the minerals (4). The existence of a customary, compiled within the period of legal memory, is conclusive evidence against the exist-

(1) *Ivimey v. Stocker*, L. R. 1 Ch. 396; 11 Jur. (N. S.) 775. *Deep Coal Company (Limited) v. Gould*, 2 De G. J. & S. 600; 11 Jur. (N. S.) 865.

(2) *Ib.*

(3) *Gould v. Great Western Deep Coal Company (Limited)*; *Great Western*

(4) *Portland (Duke) v. Hill*, L. R. 2 Eq. 765.

ence of a custom not mentioned therein (1). And where the customary of a manor, compiled within the period of legal memory, recognised a right in the tenants to dig coal *propria usis*, and it appeared from subsequent documents that the privilege of digging coal for their own consumption had been enjoyed by the tenants under the waste, but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures, and there was evidence of tenants having during a long period dug coal in their customary inclosures for sale, Vice-Chancellor Sir W. P. Wood held, that the custom was restricted to digging in the waste for coal for the tenants' own consumption, and that the tenants had no right of digging coals under their customary inclosures (2).

24. Where, in a conveyance of land in Northumberland, a reservation was made to the grantor of all "mines or seams of coal, and other mines, metals, or minerals," under the land granted, with liberty to dig, bore, work, lead, and carry away the same, and to make pits, and it appearing that freestone was always worked by quarrying in the locality, and that to work in this way would be the entire destruction of the land, the Court of Appeal held, varying a decision of Vice-Chancellor Kindersley, that the term "minerals" included freestone (in this case, a bed at a distance varying from six to forty feet below the surface), but that the grantor had liberty only to get the freestone by underground mining, and not by working in an open quarry (3).

The term
"minerals"
includes free-
stone.

25. Where the owners of land agreed to demise to A. the minerals under it to the west of a certain fault supposed to run through the land in the direction of a line drawn on a certain plan, the quantity of the land being described as supposed to be eighty-three acres or thereabouts, and the owners made a similar agreement with B. as to the minerals under the land to the east of the fault, supposed to contain ninety-eight acres, or thereabouts, and the fault was afterwards found to run so as to leave on the west eight acres only, and no lease was executed to either of the lessees, but they entered upon and commenced working the mines agreed to be demised to them respectively; on a bill filed by B. to restrain A.

Not being
(here) entitled
to specific per-
formance—no
constructive
possession
against
defendant
entitling to
maintain suit.

(1) *Portland (Duke) v. Hill*, L. R. 2 Eq. 765.

(2) *Ib.*

(3) *Bell v. Wilson*, L. R. 1 Ch. 303;
2 Dr. & Sm. 395.

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from working coal to the east of the fault, Vice-Chancellor Sir W. P. Wood held that B. was entitled to an injunction; but the Court of Appeal held that it would not, in a suit by B. for specific performance against the owners, have decreed a demise of all the minerals to the east of the fault; and that he could not be deemed in constructive possession, so as to maintain his suit against A., and reversed the decision of the Vice-Chancellor (1). In construing the words "or thereabouts," when used to qualify the statement of the estimated quantity of mines agreed to be demised, the same principles ought to be acted upon as would guide the Court in construing the same words in an agreement for sale or demise of the surface (2).

Former lord's consent to inclose binding on subsequent lord and no injunction to restrain digging for minerals.

26. Where waste land had been, with the consent of the then lord of the manor, inclosed by a former owner of the plaintiffs' property, and the plaintiffs had dug for minerals thereon, and a subsequent lord, asserting his right to the minerals, sold them to the defendant, who thereupon entered upon the property and commenced digging for them; on a bill to restrain the defendant, Vice-Chancellor Sir J. Stuart held, that the lord of the manor had not succeeded in establishing his claim, and that the plaintiffs were entitled to the minerals (3).

Owner of allotment not entitled here to restrain lord working mines under.

27. In *Wakefield v. Buccleuch (Duke of)* (4), it was held upon the construction of a local Act, and the General Inclosure Act, 41 Geo. 3, c. 109, incorporated therewith, that although the 32nd section of the General Inclosure Act provides that every allotment set out and sold to pay the expenses of any local Inclosure Act shall be absolutely discharged of and from all common and other rights thereon or therein, and be vested in fee simple in the purchaser thereof, and be held in severalty as his private and absolute property, yet, the local Act in this case, reciting that the lord of the manor was entitled to the soil of the wastes, and all mines and minerals thereunder, and directing allotments to be sold to defray the expenses of the Act, and also directing certain parts of the wastes to be allotted to the lord as a compensation for his interest in the soil, and reserving to him all the mines and minerals

(1) *Davis v. Shepherd*, L. R. 1 Ch. 410; 12 L. T. (N. S.) 538.

(2) *Ib.*

(3) *Ackroyd v. Briggs*, 13 L. T. (N. S.) 521.

(4) 36 L. J. (Ch.) 179.

under the lands directed to be divided and inclosed (except such as were devoted to public purposes), the Court held that the local Act dealt with surface rights only, leaving the lord's right to the mines untouched; that what was sold under the local Act to pay the expenses of the inclosure was the soil or surface only, subject to the lord's right to the mines as reserved by sect. 43 of the local Act, and therefore that a purchaser of an allotment so sold was not entitled to restrain the lord from working the mines under such allotment (1).

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28. Under the same Acts, where a lessee of the lord of the manor opened and worked an iron mine under an allotment sold to defray the expenses of the inclosure, thereby causing the surface of the allotment to subside, upon a bill by a sub-purchaser of the allotment against the lord and his lessee to restrain such working, Vice-Chancellor Sir R. Malins held, that the effect of the inclosure, as between the plaintiff and the lord, was to put an end to their relation of lord and commoner, and to place them in the ordinary position of the one being the owner of the surface, and the other of the mines beneath it, with the most complete rights over the surface for the purpose of working the mines; and that, even though the mines could not be worked at all without causing the surface to subside, the plaintiff had an absolute right to have his surface supported, and was entitled to restrain the defendants from letting it down (2). And it was also held, that an alleged custom entitling the lord in his workings to let down the surface would, if proved, have been bad and void (3). But the House of Lords, on appeal, affirming the first part of the decree below, declaring the defendant was owner of the mines beneath the lands, reversed that part which granted the injunction; the lord, under the Act, being entitled to work the mines to the destruction of the land above, subject only to make compensation for damage.

The inclosure (here) terminated relation of lord and commoner—and substituted relation of owner of surface and owner of mines beneath—and plaintiff (a sub-lessee) had absolute right to support of surface.

An alleged custom of lord to let down surface is bad.

29. Where K., the grantor of certain land, excepted and reserved to himself, his heirs, and assigns, the mines under the land, with power to work them without entering on the land, and without being answerable for any injury which might arise to the land or

Grantor can by express contract derogate from his grant, and while reserving mines may

(1) 36 L. J. (Ch.) 179.

Buccleuch (Duke of) v. Wakefield, L. R.

(2) *Wakefield v. Buccleuch (Duke of)*, 4 H. L. 377.

36 L. J. (Ch.) 763; L. R. 4 Eq. 613.

(3) 1b.

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reserve the
rights of
removing
vertical and
lateral support.

Prayer of a
bill to restrain
working mines
so as to injure
land or to
destroy
vertical or
lateral sup-
port.

to any buildings which should at any time thereafter be erected upon the land, by reason of the working of the excepted mines, and without being liable to any actions or suits, costs, charges, losses, damages, or expenses on account of any such injury or damage, and K., in granting another plot of land, part of the same property, excepted and reserved the mines, with power to work them without entering on the land, and without being answerable for any injury to the land or any buildings thereon by reason of working the excepted mines, or liable to any action on account of such injury or damage; Vice-Chancellor Sir W. P. Wood held, that they were express contracts entitling the grantor to remove the vertical support, and also the lateral support (1); and also that a grant may be derogated from by express agreement (2). The prayer of the bill asked for a declaration that the plaintiffs were entitled to have certain land belonging to them sufficiently supported by the adjoining land, and the mines or minerals thereunder, as a right of property incident to the property in their land, and that they were entitled to a similar right of support from the mines and minerals lying in or under their said land; and it sought to restrain the defendant Bagnall, his engineers, servants, agents, and workmen, from working and getting the mines and minerals under the lands, adjoining to the plaintiffs' said lands, or any part thereof, in such manner or to such extent as in any way to injure the plaintiffs' said land, or the buildings thereon, or any of them, or any part thereof, or so as to deprive the plaintiffs of any lateral support to their said land and buildings, to which the plaintiffs were (as the bill affirmed) entitled, and from working or getting the mines and minerals in or under the plaintiffs' said land, or the buildings thereon, or any of them, or any part thereof, or so as to deprive the plaintiffs of any vertical support to the said land and buildings to which the plaintiffs were (as the bill affirmed) entitled (3).

30. Where proceedings were taken by a reversioner to obtain an injunction to restrain the respondents from quarrying, to whom a parol license had been granted by the lessee of the reversioner, acts having been done by the grantee of the license, on the faith of

(1) *Williams v. Bagnall*, 15 W. R. 272.

(2) *Ib.*

(3) *Ib.*

the license—the Court refused the injunction with costs, the lessee not having been made a party (1).

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31. Where the barrier between two mines had been perforated, and the owner of one of them had artificially conducted his water so as to pass by the perforations into the other, that mode of removing it from his mine being most beneficial to himself, thereby causing irreparable damage to the plaintiff, Vice-Chancellor Sir W. P. Wood held, that the Court would, on an interlocutory application, grant a mandatory injunction, so as to keep things in the state (that is to say, oblige them to be restored to the state) in which they were *ante litem motam*, until the hearing (2).

32. In a suit by the M. R. Company, as owners of the Ashby-de-la-Zouch Canal, to restrain the working of a stone quarry adjoining the canal, so as to endanger the safety of the canal, where the canal company was empowered by Act of Parliament to prevent the owners of land adjoining the canal from working the mines and minerals within ten yards of it, but was required to give compensation for stopping any such workings, the Master of the Rolls held, first, that stone used for mending roads, and worked by quarrying from the surface, was here within the description of mines and minerals; secondly, that the provisions of the Act as to prohibition of working and compensation extended by implication to workings more than ten yards from the canal, and that the company might prohibit the working of any mines beyond the ten yards the working of which would endanger the canal, but that they must compensate the owner for stopping mines beyond the ten yards (3).

33. A railway company which has taken lands for the purposes of their railway, under the Lands Clauses Act (8 Vict. c. 18) and the Railways Clauses Act (8 Vict. c. 20), and has had them conveyed to themselves by a conveyance in the usual form, is not entitled to prevent the owner of the mines, subjacent or adjacent, from working and winning away the same without making compensation, and it makes no difference that the mines and minerals

A railway company taking lands cannot prevent owner of subjacent and adjacent mines working them, without compensation.

(1) *Donegall (Marquis of) v. Connor*, (Ch.) 476; *v. Robinson v. Byron*, 1 Bro. 15 W. R. 888, Ir. R. C. C. 588.

(2) *Westminster Brymbo Coal and Coke Company v. Clayton*, 36 L. J. (3) *Midland Railway Company v. Checkley*, L. R. 4 Eq. 19.

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are necessary for the support of the railway (1); and if the company, after notice of intention to work, refuses to make compensation for the mines requisite for the support of their railway, they can only compel the mine-owner to work his mines in a proper manner according to the custom of the district (2).

For inadvertent wrongful working of coal—fair market value of coal only charged.

Prayer of bill for an account of coal wrongfully worked.

34. In a suit for an account of coal wrongfully worked by the defendant, where the working was inadvertent and without fraud, Vice-Chancellor Sir R. Malins, in assessing the compensation for the coal got by the defendant, directed him to be charged only with the fair market value of the coal, as if the coal-field had been purchased by him of the plaintiff (3). The bill prayed an injunction to restrain the defendant from continuing to dig and get coal or cannel under any of the lands belonging to the plaintiff; that an account might be taken of the coal which had already been worked or procured by the defendant, and the prices obtained by him for the same; that an account might also be taken of the coal which had been brought through the plaintiff's mines so worked by the defendant from other mines; and that the defendant might be ordered to pay a proper sum for the advantage he had derived from bringing such coal through the plaintiff's mines; and the decree (without costs) declared the plaintiff entitled to the mines, and granted an injunction according to the prayer, and directed an account of the quantity of coals taken, and what the defendant was entitled to in respect thereof, and a reference whether the plaintiff was entitled to any compensation for the way-leave, or leading coal, through the plaintiff's property for the coal got under other property than the defendant's (4). In *Llynvi Company v. Brogden* (5), where a mine-owner had passed his boundary, and taken coals from his neighbour's mine, Vice-Chancellor Sir James Bacon held, that he was liable to account for the value of the coals at the pit's mouth, with just allowances for the cost of raising, but not of getting or severing; and he directed that a further inquiry should be made whether the plaintiffs had sustained any, and what, damage by reason of the defendants having broken

Party taking coal, accounts for the value of the coal at the pit's mouth—with allowances for costs of raising — and pays damages of breaking boundary.

(1) *Great Western Railway Company v. Bennett*, 36 L. J. (Q. B.) 133, H. L.

(2) *Ib.*

(3) *Hilton v. Woods*, L. R. 4 Eq. 432.

(4) *Ib.*

(5) L. R. 11 Eq. 188.

through the boundary between their mine and the plaintiffs' mine, with a declaration that the defendants were liable to pay to the plaintiffs the amount of the damage which should be ascertained in the result of the inquiry, and that the costs of the suit up to the date of the decree should be paid by the defendants to the plaintiffs, and adjourned the further consideration and subsequent costs. Where the proprietors of a mine had so worked their mine by opening cuttings to draw off the water therein that they had caused the neighbouring and adjoining mine to be flooded, and from such openings they had also abstracted coal from their neighbour's mine, and sold the same for their own benefit, Vice-Chancellor James granted an injunction to restrain them from further proceeding, to stop up the existing openings and cuttings, and from making another further opening which would have the effect complained of, with compensation for what damage had been sustained, and an account of the value of the coal abstracted (1).

35. Where the plaintiff (lessee) filed a bill to restrain the defendant, another lessee, from working fire-clay or coal in a seam under any part of the lands under which the plaintiff had a license to dig fire-clay during his term, the Court held that the defendant, whose demise included fire-clay under the same lands as those to which the plaintiff's license applied, having first taken possession of the seam, the plaintiff had no right to restrain the defendant from working that seam (2).

36. Where the plaintiffs granted a lease of a coal-mine to the defendants, reserving a minimum rent of £720, to be increased to £1000 in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity, and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice, and the lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits on the plaintiffs' property, and the plaintiffs, being desirous of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill for specific performance of the covenant in the lease, Vice-Chancellor Sir R. Malins

No obligation
(here) to sink
pits.

(1) *Plant v. Stott*, 21 L. T. (N. S.) 106. (2) *Carr v. Benson*, L. R. 3 Ch. 524; 18 L. T. (N. S.) 696; 16 W. R. 744.

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held, that there was no obligation upon the defendants to sink pits, although that might be the most efficient mode of working; and that so long as the minimum rent was paid the defendants could not be compelled to work the mine at all; and that the lessees had committed no breach of contract; but that, if they had done so, the remedy was at Law, and not in Equity; and that this Court could not, by a reference to Chambers, give effect to the covenant by directions as to the management of a coal-mine, and dismissed the bill (1).

Working coal
by instroke.

37. Where the owner of a piece of land agreed to demise the seams of coal under the land to the owners of an adjoining colliery, at a royalty on each ton of coal worked, and a dead rent of £500 if the royalties did not amount to so much; the dead rent not to be charged for the first three years, if the necessary steps were *bonâ fide* taken with ordinary dispatch to win and work the coal; and the lease was to contain a covenant by the lessee for working the coal in a proper and workmanlike manner; and the lessees proceeded to work the coal by instroke or headings from their adjoining colliery, which was situated to the rise of the seams agreed to be demised; and the lessor alleged that the lessees ought to sink a pit, and work the coal from the deep, and filed a bill to restrain them from working the adjoining colliery, and to compel payment of the dead rent, on the ground that they had not taken the necessary steps to win and work the coal, Lord Chancellor Hatherley, affirming the decision of Vice-Chancellor Sir W. M. James, held that, under the circumstances, working the coal by instroke was working in a proper and workmanlike manner; and that if the lessor had intended to compel the lessees to sink a pit it should have been provided for in the agreement; and that, as the lessees were actually working the coal, irremediable damage would not be presumed (2).

(1) *Wheatley v. Westminster Brymbo Coal Company*, L. R. 9 Eq. 538; *v. 2* L. J. (Ch.) 175; 22 L. T. (N. S.) 7.
(2) *Lewis v. Fothergill*, L. R. 5 Ch. Dr. & Sm. 347; 18 W. R. 162; 39 103.

SECT. 5. *Customs—Prescription.*PART I.
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1. There “may unquestionably exist as to mines a custom that the lord of the manor cannot take without consent of the copyholder; and, *vice versâ*, that the copyholder cannot touch the mine without the consent of the lord” (but, with regard to timber, “it seems rather admitted as a text doctrine than established by decision”): Lord Chancellor Eldon (1).

2. In *Attorney-General v. Mathias* (2), where the defendants claimed, as woodwards or foresters of the Crown, a right to grant to certain free miners gales or licenses for working stone quarries in uninclosed lands, part of the Forest of Dean, the soil whereof was in the Crown, to exact gale fees or rents in respect thereof, and to apply the same to their own use without accounting to the Crown, the Court (Vice-Chancellor Wood and Mr. Justice Byles) held (independently of the considerations that the alleged right, had it existed, would have been extinguished by the Dean Forest Mines Act (1 & 2 Vict. c. 43), and that the evidence failed to establish the exercise of any such right in point of fact), that no such right could exist in point of law; for, with regard, *first*, to the free miners, it was a claim to subvert the soil, and carry away the substratum without stint or limit, which could not be established (1) by *custom*, for it was a *profit à prendre*, which cannot be claimed *in alieno solo*; nor (2) by *prescription*, for prescription, to be good, must be both reasonable and certain, and this was neither; nor (3) by presuming a lost grant, for prescription presupposes a grant; and if such a grant cannot be presumed before, *à fortiori* it cannot after, the period of legal memory, and a claim which cannot lawfully be made upon one of these three foundations cannot be substantiated by a user, however long, and is not saved by any Statute of Limitations; and with regard, *secondly*, to the defendants, besides the foregoing objections, they could not shew a valid prescription exempting them, as officers of the Crown, from accounting for the proceeds of the Crown’s soil which they had sold; and the Court also held that the office of woodward or forester of the Crown is an office of trust, incapable of assignment

(1) *Whitechurch v. Holworthy*, 19 Ves. 214. (2) 4 K. & J. 579; 27 L. J. (Ch.) 761.

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without a license from the Crown founded on the return to a writ of *ad quod damnum*. This was an information exhibited on behalf of the Crown, praying (1) that it might be declared that the defendants *Mathias* had not any right or title to grant gales or leases within any part of the forest to any person or persons whomsoever, or to exact gale fees or rents in respect thereof, and that they might be restrained from making or granting any more such grants or leases; and that the defendant *Morse* might be restrained from continuing his quarry; and (2) for an account of the quantities of stone worked by or under the authority of the defendants upon Her Majesty's lands within the forest, and of the issues and profits thereof received by the defendants, and an account of the sums of money, fees, rents, and royalties received by the defendants *Mathias* in respect of any gales or leases made or granted by them, or any of their predecessors in title, within any part of the forest; and the Vice-Chancellor held, that the Crown was entitled to a declaration and injunction as prayed, and also to the account asked at the Bar, except as to the gales or leases, as to which an account was asked at the Bar only in respect of such as had been granted by the defendants without adding "or any of their predecessors in title" (1).

SECT. 6.—*Common, Right of.*

1. Where an Act of Parliament empowers certain persons to deal with their own property for their own benefit, or with property in a certain place or district, or defined by a certain description, and does not by express words, or by necessary implication, import that the Legislature intended to affect the rights of other persons in other property, Courts of Law do not construe mere general words in the Act as affecting the rights of strangers as to property not within the description of that with which the Act expressly purports to deal: and whether an Act of Parliament is to be deemed a public Act, binding on all the Queen's subjects, or merely a private Act, depends upon the nature and substance of the case, and not upon the technical consideration whether the

(1) *Att.-Gen. v. Mathias*, 4 K & J. 579; 27 L. J. (Ch.) 761.

Act does or does not contain a clause declaring that it shall be deemed a public Act; and therefore where an Act of Parliament empowering commissioners to inclose the common lands in a certain township, reciting the titles of certain landowners, and that it would be greatly for the advantage of the proprietors of the common lands that the same should be divided and inclosed, enacted, that it should be lawful for the commissioners to set out and make such ditches, watercourses, and bridges, of such extent and form, and in such situations, as they should deem necessary in the lands to be inclosed; and also to enlarge, cleanse, or alter the course of and improve any of the existing ditches, watercourses, or bridges, as well in and on the same lands as also in any ancient inclosures or other lands in the township, as they should deem necessary; Vice-Chancellor Sir J. Wigram held, that the Act did not empower the commissioners to alter the drains or watercourses in the common lands from another township, and thereby to obstruct the drainage of the lands in such other township, to the damage and injury of the owners of such lands (1).

2. Where the lord of a manor (namely, the plaintiffs, tenant for life, and the reversioner) inclosed part of a common, insisting it was an improvement within the Statute of Merton, and Westm. 2, the Court continued an injunction and directed a trial whether the plaintiffs, or either of them, had a right of approval in the manor, and whether sufficient common was left for the defendants, two small tenants (2).

3. Where the lord enfranchises a copyhold with all common thereto belonging; though the common be extinct at Law, yet it subsists in Equity (3). In this case the lord of a manor enfranchised a copyhold, with all commons thereto belonging or appertaining, and afterwards bought in all the other copyholds, and then disputed the right of common with the copyholders he had enfranchised, and at law recovered against the plaintiff, because the prescription of common to the copyhold was destroyed by the enfranchisement; and the grant of the copyhold, with all common thereunto belonging and appertaining, gives no right of common,

A common
may be ex-
tinct in law,
yet subsisting
in equity.

(1) *Dawson v. Paver*, 5 Hare, 415;
11 Jur. 766; affirmed on appeal by the
Lord Chancellor, July 30, 1847.

(2) *Weeks v. Staker*, 2 Vern. 301.

(3) *Styant v. Staker*, 2 Vern. 250,
2nd Ed.

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because when enfranchised there is no common, in point of law, belonging or appertaining thereunto (1); and on a bill to stay proceedings on a judgment obtained by the defendant (plaintiff at law), the Court decreed the plaintiff, his heirs and assigns, should hold and enjoy against the defendant the same right of common of pasture and estovers as belonged to the copyhold; and that, inasmuch as the said defendant had gone to law against equity, and recovered a judgment at law against the said plaintiff, the injunction was made perpetual, and the defendant ordered to pay the costs.

4. Where a man had granted to J. S. common in his down for 100 sheep and five rams, and the grantee, by his bill, complained that the grantor overstocked the common, so that the plaintiff could have no benefit of the grant, and prayed that the grantor might be enjoined not to overstock, &c., the Court dismissed the bill (2), and it should seem that the plaintiff has an action at law (3)

Bill lies against lord by one copyholder on behalf, &c., to have right of common ascertained.

5. A bill will lie against the lord by one copyholder on behalf of himself and the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder not suing on behalf of all cannot maintain such a bill; and where one individual was seised of the whole of the hereditaments held of a manor, with the exception of one small tenement, the owners of which were not made parties to the suit, the Lord Chancellor, Lord Chelmsford, held, reversing the decision of the Master of the Rolls, Lord Romilly, and dismissing the bill with costs, including the costs of the Court below and of the appeal, that an individual in such a position could not file a bill praying a declaration of his commonable rights as against the lord, and an injunction to restrain the lord from infringement thereof, his remedy being by action at law; and a bill to determine manorial customs may be filed by one person, but only as a bill of peace on behalf of the individual and other parties (4).

One freehold tenant of manor can

6. A suit for the purpose of establishing a right of common over the wastes of a manor may be maintained by one freehold tenant

(1) *Dorson v. Hunter*, Noy, 136.

(2) *Fines v. Cobb*, 2 Vern. 116, 2nd Ed.; Eq. Cas. Abr. 103, pl. 3.

(3) F. N. B. 125; *Robert Mary's Case*, 9 Rep. 112.

(4) *Phillips v. Hudson*, L. R. 2 Ch. 243; 15 W. R. 370.

of the manor on behalf of himself and all other freehold tenants. It is not incumbent on the plaintiff in such a suit to prove that a right of common was granted at the same time as the land; but the Court will presume the grant where the user has been long-continued and uninterrupted, and the burden of proof lies on the lord who seeks to disturb the long-continued user. Where the lord has attempted to stop the user of a common, the fact that some of the tenants have yielded to such attempts is not an interruption of the right within the meaning of the Prescription Act (2 & 3 Will. 4, c. 71), so as to bar the rights of freeholders who, as a body, have never yielded to, or acquiesced in, the claim of the lord. The bill prayed for a declaration that the plaintiffs and other freehold tenants of the lords of the said manor were entitled to various common rights, and for an injunction to restrain the defendant college, their servants, agents, and workmen, from inclosing, or suffering to remain or be inclosed, any part of the three commons named, and from letting or agreeing to let any part of the commons as a practice-ground for the exercise of artillery, cavalry, and infantry, and from in any manner disturbing or interfering with any of the said rights of the plaintiffs and the other freehold tenants of the lords of the said manor on and over the three commons, or any or one of them; or interrupting their free ingress to and egress from the same, or any or one of them; and in particular from erecting, or commencing to erect, and from entering into any agreement as to the erection, of any houses, buildings, or fences upon any part of any one of the three commons, and from allowing any roads or paths recently stopped up to remain so stopped up (1). A bill will lie on behalf of freehold tenants of lands originally demesne of a manor to establish their commonable rights in respect of their several tenements (2), and an injunction was granted restraining the defendant from putting up fences so as to prevent the commoners from exercising the right to depasture their cattle, and take gorse, turf, and gravel as they had done before the institution of the suit. One who is a freehold and copyhold tenant of a manor can maintain a suit on

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maintain suit
on behalf of
himself and
all other free-
hold tenants.

Prayer of such
a bill.

A freehold
and copyhold

(1) *Warwick v. Queen's College, Oxford*, L. R. 10 Eq. 105; 18 W. R. 1099.
719; 39 L. J. (Ch.) 636.

(2) *Betts v. Thompson*, 18 W. R.

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tenant can
sue on behalf,
&c.

Prayer of
such a bill.

behalf of himself and all other the freehold and copyhold tenants, notwithstanding the rights of each freeholder are separate and distinct from those of the copyholders. Where, in 1618, an arrangement had been made between the lord of a manor and the tenants that a specified extent of the waste might be approved, and such arrangement had not been subsequently disturbed until 1866, the Court held, that on approving a further portion of the waste the burden lay on the lord of shewing that enough pasture was left for the use of the tenants. The bill was filed by the plaintiff on behalf of all other the freehold and copyhold tenants of the manor of Berkhamstead shortly after an action for trespass had been brought by the lord, and prayed that it might be declared that the freehold and copyhold tenants were entitled, as common appendant to their freehold and copyhold tenements, to a right of common of pasture upon Berkhamstead Common for all sorts of cattle, levant and couchant, as well commonable as others, and to a right of estovers, and haybote and woodbote, and to cut so much furze, gorse, fern, and underwood upon the said common as might be required for the purpose of fodder and litter for cattle levant and couchant upon the said tenements, and for fuel, and other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of the said tenements, and to a right to use the whole of the common for walking, driving, and riding on horseback, and for the enjoyment of air and exercise, and for amusement and recreation, and for an injunction to restrain the plaintiff from interfering with such rights; and the Master of the Rolls made a decree in the terms of the first part of the prayer, omitting the estovers and right to recreation, the evidence as to these being of modern date (1).

SECT. 7.—*Way, Right of.*

A parish may
possess an ex-
clusive right of
way—but no
presumption of

1. A parish may possess, as private property, an exclusive right of way, but it must be by express grant from the owner of the land, and no such right can be presumed to have arisen from dedication,

(1) *Smith v. Earl Brownlow*, L. R. (N. S.) 739; *et v. Hoare v. Wilson*, 18 9 Eq. 241; 18 W. R. 271; 21 L. T. W. R. 272, n.

inasmuch as there can be no such thing as a dedication to a part of the public, and no dedication to the public of a right of way will be presumed to have been made by the reversioner in fee of land during the existence of a term of years under a lease (1). dedication to a parish.

2. Where, under several local and public Acts, the vestry of a parish (Bermondsey) were constituted custodians of the public ways, and were empowered to take such proceedings as they should think expedient against any person stopping or impeding any public way, and had the soil of such ways vested in them, and they instituted a suit to restrain the defendant from erecting or continuing any building over a ten-foot way, leading from Bermondsey Wall to the River Thames, so that the said way, or the right of user and enjoyment of the same by the public as an open and uncovered way, might be hindered, obstructed, or interfered with in any manner, the Master of the Rolls, Lord Romilly, held, that they could not sustain a suit by bill filed by them as plaintiffs in the ordinary course, but must take proceedings by way of information in the name of the Attorney-General; the bill was therefore dismissed on the ground of its being defective in its form, and also that it had, under the principles stated in pl. 1, *supra*, failed on its merits (2).

3. Where the owner of two adjoining closes, A. and B., who had, during the unity of possession, made and used, for his own convenience for agricultural purposes, a way across B. to A., executed a conveyance of close A. to a purchaser with these general words, "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or heretofore occupied or enjoyed;" and the purchaser, who had access to A. from other land of his own, claimed under the conveyance the right to use the roadway over B.; on a bill praying a declaration of such right, and that the defendant might be restrained from interfering with such user, the Master of the Rolls held, that as there was no roadway over B. to A. before the unity of possession, the right to use it did not pass under the general words of the conveyance (3).

4. Where a messuage, abutting in the rear on a narrow lane in a

(1) *Bermondsey (Vestry) v. Brown*,
14 W. R. 213.

(2) *Ib.*

(3) *Thomson v. Waterlow*, L. R. 6
Eq. 36; 37 L. J. (Ch.) 495; 16 W. R.
686; 18 L. T. (N. S.) 545.

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city, had a back-door, which, after being constantly used for access to or from either end of such lane, was shut up for forty years, during which time also (although the two periods were not exactly commensurate in date) gates were put up at either end of the lane to abate a nuisance, but only occasionally closed, being, in fact, the result of an arrangement amongst the occupiers of the houses; and free access being always given, although a key was kept, and the back-door of the messuage was then reopened and continuously used for three and a half years, when the next but one adjoining house was purchased by the corporation, who proposed, and had plans prepared, to build upon the site of the house and lane an hotel and baths, so as entirely to obstruct the way from such back-door through the lane, on a bill filed, an injunction was granted to restrain such building (1).

SECT. 8. *Fairs—Markets.*

A corporation
restrained
(here) holding
a fair on a
cricket
ground.

1. Where land had been directed by a local Act to be put and kept in proper condition for purposes of recreation, Vice-Chancellor Sir J. Stuart restrained a corporation from holding thereon a fair at which cattle were sold. By a local Act passed for improving the marsh and other common lands, and extending rights of common and recreation within a town, reciting that a portion of the marsh lands, consisting of four acres, was better adapted for the purposes of recreation than the other portions of the marsh; it was enacted that rights of common and recreation should not be extinguished, and that the four acres should for ever thereafter be subject to such rights of common and of recreation, and other public rights, "as had theretofore been exercised and enjoyed thereon;" and it was also provided, that "except as was therein otherwise provided" all the waste lands which were then vested in the corporation should remain subject to the existing rights of common and recreation, and such powers were given to the corporation to fence, drain, and manage the lands as they should think proper for the public advantage of the inhabitants; and the corporation was also empowered to remove a fair to such parts of

(1) *Cook v. Bath (Mayor, &c.)*, L. R. 6 Eq. 177; 18 L. T. (N. S.) 123.

the waste lands as they should think fit. In the exercise of their discretion, the corporation removed the fair to the four acres which were called "The Cricket Ground," and had theretofore been used for the purpose of playing cricket. But the Court held, that the corporation by so doing had contravened the powers of the Act; and granted a perpetual injunction to restrain them from holding the fair on the cricket ground, with costs (1).

2. In *Weale v. West Middlesex Water Company* (2), Lord Chancellor Eldon says, that fairs and markets stand upon a very ancient principle, that persons cannot interpose themselves in the exercise of that franchise, against the right conveyed by grant, but that no grant can be made, by virtue of that authority, injurious to the common interests of the public; therefore, reasonable tolls only can be demanded; and that we know that ancient usage has generally determined what they shall be. But if the claim be to take reasonable rates, then, he apprehended, if a person was going to that fair or to that market, and was refused the accommodation required by law to be given him, the question was, not whether he might bring an action for damages for being prevented that enjoyment, but whether a bill in Equity could be filed for an injunction to permit any person to come there that pleased, and that he certainly never heard of such a bill. In an anonymous case (3), Lord Hardwicke refused an injunction to stay the use of a market, saying that it was a most extraordinary attempt, of which he had never known an instance before, that the plaintiff had several remedies at Law, whereby he had come originally into this Court for an injunction; that if in any case this Court ought to interpose, it would be after the title had been established at Law, which had not been done here.

3. It is essential to the complaint of an old market, against a new one set up near it, that the old one was competent to the accommodation of the public, because otherwise they could have no right to complain (4).

An old market
must be com-
petent.

(1) *Att.-Gen. v. Southampton (Mayor, &c.)* 1 Giff. 363.

(2) 1 Jac. & W. 373.

(3) 2 Ves. Sen. 414.

(4) *Ex parte O'Reilly*, 1 Ves. Jun. 114.

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SECT. 9. *Fisheries.*

Injunction
granted on a
title under the
Crown, de-
duced from
King John, to
restrain fish-
ing in a river.

1. Where by letters patent of Charles II. the fishery of the river of Galway, from Lough Carib to the sea, was granted to B., under whom the petitioner A. claimed ; and the title of the Crown and its grantees to the fishery was deduced from the reign of John, and acts of ownership, and convictions of persons who had trespassed on the fishery were given in evidence, and the title of A., the petitioner, had been established by the verdict of a jury in a prohibition suit at Law, to which some of the respondents were parties, and the respondents admitted the right to a fishery in a part of the river, but contended that in other parts they and the public, from time immemorial, had exercised a right of angling ; and they proved that for many years persons had been in the habit of angling in all parts of the river ; the Court of Chancery in Ireland granted a perpetual injunction to restrain the respondents from fishing, without directing an issue or action (1).

Local board
restrained con-
structing a
sewer with
outlet into a
river where a
free fishery.

2. A local board of health having commenced the construction of a sewer under certain fields, on the banks of the river Avon, belonging to the plaintiffs, who were also entitled to a several fishery, and to watering places for cattle in the river, but were not owners of the water, or of the bed of the river—the outlet to such sewer being intended to open into the river within the limits of the free fishery—were restrained by injunction from prosecuting the works (2).

3. Where A. owned lands on the Delaware river, and held and enjoyed a fishery appurtenant thereto, and after his death his estate was divided, by commissioners, among his heirs ; and they separated the lands lying contiguous to the river from the fishery by lines and fixed monuments, and set off the fishery as a separate share, the line of separation being the usual high-water mark ; an injunction which had been granted, restraining the owner from building a wall on such line, was dissolved (3).

(1) *Ashworth v. Browne*, 10 Ir. Ch. and Eq. 503 (Amr.)
Rep. 421.

(3) *Howell v. Robb*, 3 Halst. Ch. 17

(2) *Oldaker v. Hunt*, 19 Beav. 485 ; (Amr.)
6 De G. M. & G. 376 ; 31 Eng. Law

SECT. 10. *Copyholds.*PART I.
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1. The Court has concurrent jurisdiction with Courts of Law to relieve a copyholder against an illegal seizure of the copyhold property by the lord, and is not limited to compelling the lord to do right as between two persons claiming to be copyholders; and the circumstance of the copyhold lands being subject to a demise by the copyholder is such a circumstance as renders it the more proper course to seek relief in Equity, on the ground that unless the plaintiffs were willing to put an end to the lease of their tenant by taking proceedings against him to enforce a forfeiture, so as to proceed at once against the lord, either by ejectment or trespass, for the wrong which, as the plaintiffs alleged, they had sustained at his hands, they must wait until the determination of the lease before their rights could be ascertained; and *semble*, the summoning a copyholder who was known to be in India to attend a court baron in a fortnight is an inequitable act whereon to found a forfeiture by the copyholder (1). And where, in 1856, copyhold lands of a *feme sole* (subject to a lease previously granted by her for a term, of which twelve years were unexpired) were, on her marriage, conveyed to trustees by way of covenant to surrender upon trust for sale, and to hold the sale moneys upon the trusts of a marriage settlement, with power to the trustees to contract for the enfranchisement of the lands, and to raise the money to be paid for enfranchisement by sale or mortgage; and the husband and wife immediately proceeded to India, where they had ever since continued, and in consequence of political disturbances there, no communication had been made with them during the course of the transactions complained of; and the lord gave notice to the solicitors in England of the copyholder, requiring the lands to be enfranchised for a gross sum, and refusing to receive a rent-charge in lieu of such gross sum, as provided by the Act; and, without any further communication, the lord served on the solicitor a summons for the copyholder to attend a court baron in a fortnight;

(1) *Andrews v. Hulse*, 4 K. & J. 392; 4 Jur. (N. S.) 581; *et v. Litton's Case*, Cary, 8.; Viner's Abr., Cop. E. d. pl. 2 (vol. 6, p. 152); Coke, Cop. s. 9; Fitzherbert, Nat. Brev. p. 12; Com. Dig., Cop. p. 2; Fitz. Abr., tit. Subpoena, 21, cited by the Vice-Chancellor in his judgment.

Chancery has concurrent jurisdiction with common law to relieve against illegal seizure.

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and it having therefore been impossible to communicate with the copyholder in the interim, the lord directed his bailiff to seize the lands, alleging the felling of timber, digging of gravel, non-payment of quit rent, and non-attendance at courts baron, as his reasons for the ouster, and the bailiff seized accordingly, and the lessee attorned tenant to the lord, and the copyholder thereupon filed a bill to have the seizure set aside, and to be relieved against all the proceedings, alleging that the felling of timber, and digging gravel, if any such acts had taken place, were wholly unknown to him, and without his sanction; and alleging, in fact, that the lessee in possession was colluding with the lord; Vice-Chancellor Sir W. P. Wood, held, on demurrer, that he was entitled to relief, but reserved the costs until the hearing of the cause, on the ground that if the result of the proceedings should be, to shew that relief is to be sought in a Court of Law, it would be very unreasonable that the defendants should be put to additional costs by proceedings in this Court (1). And Equity has jurisdiction over a judgment in a copyhold court (2).

The lord cannot, independently of custom, cut down timber on the tenant's premises.

2. The lord of the manor has not by law, independently of custom, any such property or interest in the timber growing on the copyhold premises of a tenant as entitles him to enter without the consent of the tenant, and cut down to his own use and benefit the timber growing thereon, leaving a sufficient quantity for reasonable botes and estovers (3).

In *Nash v. Derby* (4), where A., having two copyholds, held of the manor of B. cut timber on one and employed it in repairing the other; and, after a verdict on an ejectment by the lord for the forfeiture, A. filed a bill in Equity to be relieved against the forfeiture, he was relieved, but ordered to pay the costs at Law and in Equity, and also to pay the fees on re-admission, but no fine.

3. The lord of a manor is entitled to an injunction and an account in respect of waste by a copyholder (5).

4. Upon a bill to prevent waste in digging and carrying the soil in manors that lie in the levels in Cambridgeshire, Lord Hardwicke

(1) *Andrews v. Hulse*, 4 K. & J. 392; 4 Jur. (N. S.) 581.

(2) 1 Roll. Abr. 60, 373.

(3) *Whitechurch v. Holworthy*, 19 Ves. 213; S. C. 4 M. & S. 340.

(4) 2 Vern. 537.

(5) *Richards v. Noble*, 3 Mer. 673.

ruled that a copyholder tenant in fenny and marshy lands may be entitled to dig up the lord's soil for turf, but that an occupant who is no more than a tenant at will can never have a right to take away the soil of the lord, that is to say, a right to a common of turbary (1).

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5. A custom in a manor that copyholders of inheritance may break the surface and dig and get clay, without stint, out of their copyhold tenements, for the purpose of making bricks to be sold off the manor, is good in law (2). In a suit by a lord to restrain a copyholder from digging vitreous or silver sand used for the purpose of making glass on his own tenement, evidence of a custom to dig vitreous sand for twenty-seven years (about the time it appeared to have been discovered), and of a custom to dig sand generally for a long period, was advanced; and Lord Chancellor Westbury, reversing a decision of Vice-Chancellor Sir W. P. Wood, who had granted a perpetual injunction to restrain the defendants from digging, raising, or carrying away, or from causing, or ordering, or consenting to, the digging, or raising, or carrying away by any other persons or person, of any sand from or out of the two closes of land in the bill mentioned, and dismissing the bill with costs, held, that the evidence of the custom was sufficient, and also ruled that the 2 & 3 Will. 4, c. 71, s. 1, applies only to cases where a person claims by custom, prescription, or a profit or benefit *à prendre* from the land of another, and has no application to a right claimed by a copyholder on his copyhold tenement according to the custom of the manor, which is not, for this purpose, the land of the lord of the manor, and that that statute does not invalidate the natural effect of acts not thirty years old as evidence in support of the existence of a custom. And further, that a custom may be good for copyholders to carry away the entire soil of their copyhold tenements (3).

A custom that copyholders may get clay without stint, is good.

(1) *Dean, &c., of Ely v. Warren*, 2 Atk. 189. (2) *Salisbury (Marquis) v. Gladstone*, 9 H. L. C. 692.

(3) *Hanmer v. Chance*, 11 Jur. (N. S.) 397; 34 L. J. (Ch.) 413.

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CHAPTER I.SECT. 11. *Leases.*

Lessors of ice-
houses (here)
no right to de-
rogate from
grant by sub-
sequent
licenses to
take ice.

1. Where a canal company, in consideration of the lessee's expenditure on certain icehouses on the banks of the canal, granted a lease thereof, with license to take ice from a part of the canal, Lord Chancellor Campbell, affirming the decision of Vice-Chancellor Wood, held, that the license was not exclusive; but that it was a grant of sufficient ice to enable the lessee to fill the icehouses; and that, so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licenses which would interfere with it (1).

No sale or un-
derletting
(here) by
assignees of
bankrupt
without con-
sent of lessor.

2. Where A. demised a farm to B. for twenty-one years, and the lease contained covenants that B., his executors, administrators, or assigns, would not at any time during the period assign or underlet; that in case B., his executors, administrators, or assigns, should, by his or their own act, default, or procurement; or by act of law, or by virtue of any Act of Parliament, lose or be deprived of the possession of the premises, or of the term granted, or any part thereof, without the consent in writing of A., he might re-enter; and B., in October, 1859, was adjudicated bankrupt, and his assignees took possession, and in July, 1860, negotiations in reference to a person proposed as tenant having failed, the assignees paid the half-year's rent due on the 25th of March previously, and they then advertised the lease for sale by auction, Vice-Chancellor Sir J. Stuart held, that on the acceptance of the rent by A. the assignees became entitled to the lease by contract with him, and not by operation of law, and that consequently they were bound by all the covenants, and could not sell or underlet without the consent of A. (2) In September an interim injunction had been granted, restraining the assignees from assigning, underletting, or disposing of the farm, without the consent of A. In October the assignees allowed S. to enter into possession without such consent, alleging that he was their bailiff. The stock and implements on the farm were the property of S., and he received no remuneration or wages from the assignees, the agreement being, that he should

(1) *Newby v. Harrison*, 1 J. & H. 393; affirmed, 4 L. T. (N. S.) 424. (2) *Dyke v. Taylor*, 6 Jur. (N. S.) 1329; 3 L. T. (N. S.) 500.

be tenant of the farm if the assignees succeeded. On motion to commit for breach of the injunction, the Vice-Chancellor held, that the arrangement with S. was a mere device to evade the order of the Court; that the assignees had parted with possession of the property, and that they must pay all the costs (1).

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3. Where a dwelling-house, with grounds and ornamental water, had been demised together with the control of a plantation (which was on the opposite side of the ornamental water, and belonged to the lessor, but was not demised to the lessee) for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessor, his heirs or assigns; and the lease referred to a plan on which the plantation was represented; the Court held, that, on the construction of the lease, as explained by the plan, the lessor was not at liberty, during the term, to destroy the plantation, and an injunction was granted to restrain him from so doing (2).

Lessor (here) no right to destroy a plantation though not demised.

4. It is no defence for the assignee of an original lease (who had taken a renewed lease) to say that he should be liable to forfeiture of the renewed lease if he were compelled by the decree to give specific performance of an agreement, upon taking an assignment of the original lease, to reserve a certain box at the Opera House; and the Lords Justices held, affirming a decision of Vice-Chancellor Stuart, that the defendant refusing compensation in money or otherwise, the plaintiff was entitled to relief. If the circumstances which give rise to the danger of forfeiture arise from the defendant's own acts, it will decree specific performance and leave the defendant open to the consequences of his own acts (3).

Liability to forfeiture no defence (here).

5. Where A. recovered judgment against B., and had a lease sold to him by the sheriff, and C., the ground landlord, entered and, having judgment in ejectment for non-payment of the ground rent, offered A., upon payment of arrears of rent and costs at law, to make him a new lease for the remainder of the term, and A. refusing this offer, C. let it to another, and A. brought his bill to be relieved against the re-entry and forfeiture at law, having at last, and before filing the bill, tendered the arrears and costs at law,

(1) *Dyke v. Taylor*, 6 Jur. (N. S.) 1329; 3 L. T. (N. S.) 500. (2) *Nicholson v. Rose*, 4 De G. & J. 10.

(3) *Helling v. Lumley*, 4 Jur. (N. S.) 868; 28 L. J. (Ch.) 249.

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his bill was dismissed with costs on the ground (*inter alia*) of his said refusal of the above offer as to payment of arrears and costs (1).

Solvency or
insolvency of
tenant upon a
contract for
lease.

6. Upon a contract for a lease the solvency or insolvency of the tenant is an objection of weight, depending upon the circumstances, and upon that and other circumstances an injunction, in *Buckland v. Hall* (2), against an ejectment by the landlord was dissolved.

Lessee re-
deeming lease
forfeited for
non-payment
of rent.

7. A lessee applying to redeem a lease which has become forfeited at law by non-payment of rent, is not required by the statute 4 Geo. 2, c. 28, s. 3, before the hearing, to pay into Court the arrears of rent or the costs at law, if no injunction is granted until the hearing, and the lessor is in actual possession undisturbed by the interposition of the Court, and the first application which the tenant makes to the Court for any relief is made at the hearing of the cause; but the provision in the 3rd section for payment into Court of the arrears of rent and costs applies only to the case where the tenant comes for an injunction by which his possession is to be continued, and the landlord restrained from proceeding with his ejectment. In all these cases if the injunction is granted, the Court is bound by the statute of George (3) to impose such terms for the security of the landlord. Before the statute was passed the tenant could at an indefinite time after he was ejected have filed his bill, and been relieved against the effects of the non-payment of rent. The statute, by the 2nd section, limited the time within which the lessee might obtain relief, and enacted that if the lessee suffered judgment to be had and execution to be executed without paying the rent and costs, and without filing any bill in Equity within six months after such execution, he should be absolutely barred from all relief in Law or Equity, other than by writ of error; and by the 3rd section it is enacted that no lessee shall have or continue any injunction against proceedings in ejectment unless he shall pay into Court, within forty days after a full and perfect answer of the lessors of the plaintiff in ejectment, the arrears the lessors of the plaintiff in the ejectment shall in their answers swear to be due, and just allowances and costs; whereupon, under the 4th section, all proceedings in the action shall cease, and the lessee shall, if relieved under the statute, hold the demised

(1) *Doerrington v. Jackson*, 1 Vern. 449.

(2) 8 Ves. 92.

(3) *Ante*.

lands according to the lease thereof made, without any new lease. These clauses have been substantially re-enacted, with a few immaterial variations, by the Common Law Procedure Act (15 & 16 Vict. c. 76, ss. 210—212, (1).

8. Where in a lease containing a clause of distress, and if no sufficient distress the landlord might enter without previous demand, an ejectment for non-payment of rent was brought and judgment by default obtained, and the landlord sued out a *habere*, and went into possession in May, 1824, and, after bringing ejectment unsuccessfully to recover possession, the tenant filed a bill for redemption and relief against the forfeiture; the Court, in Ireland, held, that he was entitled, the landlord accounting for the profits while in possession, and the tenant paying the rent, interest, and costs (2).

9. Where a lease of a farm contained a covenant on the part of the lessee against alienation or parting with possession without the lessor's assent, and a condition for re-entry in that event, whether occurring by act of the lessee or by operation of law, and the lessee became bankrupt; on a bill filed by the lessor, alleging that the assignees had elected to take the lease, and were about to assign and to part with the possession without the lessor's assent; that the farm was within a short distance of the lessor's residence, and that it would cause personal annoyance to the lessor if the farm was assigned to a person not approved by him; the Court held, that a sufficient cause of mischief was not made out to support an interlocutory injunction (3).

10. Where a lease contains a proviso for re-entry for non-performance of covenants, and a covenant is broken for want of the previous consent of the lessors to alterations, the receipt of rent is a waiver of the forfeiture (4).

Where covenant is broken for want of lessor's consent, receipt of rent waives forfeiture.

11. Where T. had agreed to rent a mansion house and 100 acres of land, with the exclusive right of sporting over 800 acres more, paying £300 a year for the house and 100 acres, and £100 for the shooting; and a draft agreement for a lease was signed, and without any more formal document (although an agreement was pre-

(1) *Bowser v. Colby*, 1 Hare, 109.

(3) *Dyke v. Taylor*, 3 De G. F. & J.

(2) *Canny v. Hodgins*, Hay. & J. 769. 467.

(4) *Miles v. Tobin*, 17 L. T. (N. S.) 432; 16 W. R. 465.

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Equity aids
tenant in pre-
venting land-
lord breaking
a covenant
which works
forfeiture of
tenant's
estate.

pared, but never executed) T. entered, and continued to the end of the term, some other stipulations in this agreement being carried out; and during the last year of the tenancy a tenant of the 800 acres commenced cutting away some underwood, and T. remonstrated, but without effect; a bill filed by T., within a year of the termination of the tenancy, for specific performance of the agreement for the lease, to restrain the cutting of the cover, and for damages, was dismissed with costs (1).

12. Equity will aid a tenant in preventing his landlord from breaking a covenant, which will work a forfeiture of his (the tenant's) estate, although not made with the tenant, and even when a suit at law cannot be maintained on such covenant (2), and will also restrict a lessee to the specific performance of his covenants (3).

13. The Court will require the strongest expressions in a mining lease to induce it to imply a covenant to sink a shaft upon the demised land (4). A covenant to continue working will not be implied from a covenant to work in a proper manner (5). In assessing damages for trespass done in working coal, the Court will inquire whether the trespass was committed while there was a *bonâ fide* question of title pending, or under a mere assertion of right; and in the former case the trespasser will be allowed the expenses of winning and getting, as well as of raising and hauling the coal (6). Where the lessee of a mine has constructed a channel through which water from another mine of the lessee naturally flows, the lessor of the mine, on the determination of the lease, has no right to an injunction to restrain the lessee from permitting his water to flow through the channel in the mine (7).

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|---|---|
| (1) <i>Turner v. Clowes</i> , 20 L. T. (N.S.) 214. | <i>Lewis v. Fothergill</i> , L. R. 5 Ch. 103. |
| (2) <i>Rogers v. Danforth</i> , 1 Stockt. 289 (Amr.) | (5) <i>Ib.</i> |
| (3) 2 Story Eq. 25, 710; <i>Nuthrown v. Thornton</i> , 10 Ves. 159. | (6) <i>Ib. et v. Martin v. Porter</i> , 5 M. & W. 351. |
| (4) <i>Jegon v. Vivian</i> , 19 W. R. 365; | (7) <i>Jegon v. Vivian</i> , <i>Lewis v. Fothergill</i> , <i>ante</i> . |

SECT. 12. *Executions (so far as relate to Real Property, including Leaseholds)—Elegit.*

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1. Where, in Ireland, an elegit creditor in possession made a lease of the extended lands for twenty-one years, provided his estate should last so long, and before the debt was paid off or the years had expired, the lands were sold under a decree in a creditor's suit, and so conveyed to a purchaser, and the conveyance was executed by the administrator of the elegit creditor; the Court held, that though the estate by elegit was merged by conveyance as between the creditor and the purchaser, it had continuance as between the purchaser and lessee to support the lease, which still existed at law; but that the lease in equity was at an end, and, *semble*, the Court would enjoin the lessee from enforcing his legal title under it (1).

2. Where a decree has been obtained by a creditor on behalf of himself and other creditors, a prior creditor who has obtained judgment at law in ejectment grounded on an elegit, shall not be allowed to get into possession (2).

3. In *Brown v. Perrott* (3), where, after verdict, and before judgment had been entered up, the defendant sold his leaseholds by auction; upon a bill praying (*inter alia*) that the plaintiff might be let in to levy execution on the defendant's share of the purchase money; or otherwise that the proceeds might be applied in payment of the plaintiff's demand and for an account and an injunction; the Master of the Rolls, Lord Langdale, held, on demurrer, that under 1 & 2 Vict. c. 110, the plaintiff could not levy execution on the purchase-money.

4. By the 23 & 24 Vict. c. 38, s. 1, it is enacted that a judgment shall not be a charge upon land so as to affect purchasers, unless the judgment creditor should issue execution and register the writ of execution; and by the 27 & 28 Vict. c. 112, s. 1, it is enacted that no judgment entered up thereafter shall affect any land until such land shall have been actually delivered in execution by virtue of a writ of elegit, and the writ registered, but that the judgment creditor to whom land has been actually delivered in

(1) *Williams v. Morris*, 13 Ir. Eq. R. 17. (2) *Sumner v. Kelly*, 2 Sch. & Lef.

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(3) 4 Beav. 585.

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execution shall be entitled forthwith to have the benefit of his judgment (1). This Act does not, however, deprive a judgment creditor of his charge who is unable to have the land delivered to to him; and where mortgagees were about to sell under a power, the Court, at the suit of a judgment creditor of the mortgagor, who had sued out an elegit, but could not obtain possession of the land under the writ, the legal estate and possession being in the hands of the mortgagees, restrained the mortgagees from paying the surplus to the mortgagor (2).

5. As between debenture-holders of a railway company and judgment creditors, a debenture-holder cannot obtain an injunction to restrain a judgment creditor from suing out an elegit (3). A judgment creditor under an elegit has a right to have such possession of the land as may avail him, subject to the right and interest of the receiver and collector of rates, tolls, and dues obtained by a debenture-holder; and to the provisions of the Act of Parliament as to the user of the undertaking for the public (4). He may, under his elegit, take the rolling stock and chattels of the company (5), but he will be restrained from taking up the rails or the fixtures (6).

6. With regard to the terms upon which a judgment will be enjoined, where a judgment debtor comes into Equity for protection, on the ground that he has satisfied the judgment, the door is fully open for the Court to modify or grant his prayer upon such conditions as justice demands (7); and injunctions to judgments at Law will, in general, be at the cost of the complainants (8).

(1) See *Re Isle of Wight Ferry Company*, 34 L. J. (Ch.) 194; *Re Hull and Hornsea Railway Company*, 35 L. J. (Ch.) 838.

(2) *Thornton v. Finch*, 4 Giff. 515.

(3) *Russell v. East Anglian Railway Company*, 3 Mac. & G. 104.

(4) *Potts v. Warwick and Birmingham Canal Company*, Kay, 142.

(5) See *Gardner v. London, Chatham*

and Dover Railway Company, L. R. 2 Ch. 201.

(6) *Legg v. Mathieson*, 2 Giff. 71.

(7) *Mechanics, &c. v. Lynn*, 1 Pet. 376 (Amr.)

(8) *Mosby v. Haskins*, 14 Ark. 360. (Amr.) (For the different local rules which prevail in different states (U. S.) with reference to the enjoining of judgments, see Hilliard, *Inj.* 184, n., 2nd Ed.)

SECT. 13. *Forfeitures—Election.*

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1. Where a party, having obtained a judgment against a tenant for life in remainder, whose estate was liable to forfeiture by his own non-user of the name and arms of the testator, filed a bill to realize the charge, the Court at the hearing refused to grant an injunction to restrain the tenant for life from forfeiting his life estate (1).

Injunction refused to restrain tenant forfeiting his life estate.

2. Where the estate of a tenant for life was liable to forfeiture on his mortgaging it, and he mortgaged it to the defendant, unknown to the parties taking under the forfeiture, the Master of the Rolls held, that the defendant was liable to account to them for the rents, at all events from the filing of the bill, and beyond that, from the time he had notice of the trusts creating the forfeiture (2).

3. Where a builder had agreed to take some land on a building lease, and to erect houses within a specified period, the landowner making him certain advances, and there was a clause of forfeiture in default of their being completed within the time, the Court refused relief to the builder against a forfeiture, it appearing that the landowner had fully performed his part of the contract (3).

4. In *Green v. Green* (4) it is quæried whether there is a distinction, upon election, between a deed and a will, that is to say, whether, in the latter case, the principle is forfeiture or compensation only; but upon election against a marriage settlement, as operating as a contract, an injunction was granted on the principle of forfeiture (5).

SECT. 14. *Covenants.*

1. Where a covenant is indefinite or uncertain in its terms, the Court will not interfere by way of injunction (6).

Where covenants are indefinite no injunction.

(1) *Sample v. Holland*, 33 Beav. 94. tion, W. & T. Ldg. Cas. in Eq. vol. i., p.

(2) *Hennessey v. Bray*, 33 Beav. 96. 812, 3rd Ed.; and in *Hilton v. Hilton*,

(3) *Croft v. Goldsmid*, 24 Beav. 312. 15 W. R. 193. Vice-Chancellor Malins

(4) 19 Ves. 666. held upon a will there was a forfeiture.

(5) See further on this point of compensation or forfeiture in cases of elec- (6) *Low v. Innes*, 10 Jur. (N. S.) 1037.

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Where covenants clear, injunction granted—otherwise upon interlocutory application it is a question of comparative injury.

2. Where the covenants in a lease are clear and distinct, and the breach is also clear and distinct, and irreparable injury is likely to arise, it is the duty of the Court to interfere by interlocutory injunction. If these conditions are not fulfilled according to the whole course of the Court, it becomes a question of comparative injury—on which side would greater injury be caused?—and the Court will weigh the balance of inconvenience occasioned by granting or refusing an interlocutory injunction; and therefore in *Wilkinson v. Rogers* (1), where a lease of a house contained a covenant by the lessee to use it as a private dwelling-house only, with a proviso that if any of the adjoining premises (belonging to the lessor) were converted into a shop, the lessee should be at liberty to convert his premises to a similar use, and one of the adjoining houses had for two years been used, with the consent of the lessor, for selling photographs, and frames and photographs had been exposed for sale, but before the bill was filed; the business had been put an end to by notice from the lessor, the Lords Justices, reversing a decision of the Master of the Rolls, refused, on interlocutory motion, to restrain the lessee from using his premises as an office for taking orders for coats.

3. Where an estate is vested in trustees who sell plots for building, subject to restrictive covenants of which the trustees, as covenantees, are trustees for all persons claiming under them, each purchaser has an equity against the other purchaser to compel the observance of the covenants, but such equity may be lost by acquiescence; and in a suit to enforce such an equity, the trustees are necessary parties, and if the plaintiffs desire to proceed for the purpose of recovering damages under Sir Hugh Cairns' Act (21 & 22 Vict. c. 27), the remaining purchasers ought to be represented on the record. And a plaintiff, though barred by acquiescence or otherwise from his remedy by injunction, may obtain damages under the said Act, and that, even though no action would be maintainable at law by the plaintiff; therefore, where each allottee or purchaser from a building society had entered into restrictive covenants with the trustees to whom the estate was conveyed, and who were the conveying parties to them, and it was provided that the covenantees should be trustees of the covenants for the benefit

(1) 12 W. R. 284.

of all persons claiming under conveyances by the trustees, and every allottee or purchaser had notice of the scheme of the society, and of the regulations, provisions, and restrictions under which alone he could build upon his lot, and with this notice the plaintiff and the defendant became allottees or purchasers, and the defendant soon after built a large hotel, which was completed before the bill was filed, but later he began erecting stables, with a large midden, or receptacle for manure, in front of the plaintiff's lots; and the bill prayed for the plaintiff the benefit of the covenants entered into by the defendant with the trustees, or their allottees or purchasers, and for an injunction against building in violation of those covenants and the plan, and that the building so erected might be pulled down, and damages might be awarded to the plaintiff; and the Vice-Chancellor of the County Palatine of Lancaster, at the hearing, decreed that the only proper buildings were such as had been approved by the covenantees, and directed the demolition of buildings raised after the filing of the bill, and restrained the defendant from using the stables otherwise than as general outbuildings, but the defendant appealed; and it was alleged that the trustees had sanctioned deviations from the general plan, and that the plaintiff had himself not strictly observed it: the Lords Justices held, that even if the defendant was not bound by the general plan, the plaintiff had an equity against him by force of the covenants he entered into with the trustees in the conveyance to him; that a deviation sanctioned by the trustees in breach of their duty could not displace the plaintiff's equity under that covenant; but that the plaintiff must be taken to have acquiesced, inasmuch as the hotel itself was built before the bill was filed, and he must have known that the stables were an indispensable adjunct to it, and therefore that the injunction must be dissolved, and the order directing demolition discharged (1).

4. Where A. had sold a piece of land to B., and covenanted for quiet enjoyment, and afterwards A., by placing a quantity of stone in a watercourse, had raised the level by three inches of a brook running past B.'s grounds through his, A.'s, property, the Master of the Rolls held, that, under these circumstances only, the plaintiff,

(1) *Eastwood v. Levers*, 33 L. J. (Ch.) 355; 12 W. R. 195; 9 L. T. (N. S.) 615.

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B., had not made out a case for the interference of a Court of Equity, and said that he could not find that the plaintiff had sustained any damage at all; that the utmost any one said was that the water was dammed up and rises some three inches up the wall of the ditch to the damage of the said wall, but without saying that any damage had been sustained; and that he did not find that it had made it either moist or damp, and the plaintiff had the full enjoyment of the premises; and if neither they nor he sustained any injury, and the plaintiff did not shew any damage, he had no right to the interposition of this Court; and here there was no covenant not to do the act complained of, and the damage complained of was of a description which was not susceptible of appreciation; and dismissed the bill with costs, with liberty to the plaintiff to bring any action he might be advised in respect of the subject comprised within the bill (1).

5. A covenant to use a house as a dwelling-house only, is a covenant running with the land, and is binding on the assignee of the lessee, although his "assigns" are not, nor were they here, named in the covenant, and in this case an injunction was granted to restrain a breach by an assignee and his sub-tenant of the lease (2).

Purchaser of reversion with notice of restrictive covenant, bound in Equity thereby.

6. Where an owner in fee of two plots of land demised the first for an hotel, and covenanted that he would not let any house or land within a certain distance of it to be used as an hotel, and demised the second plot, which was within the distance, to another person, and the defendant purchased the reversion of the second plot, and afterwards bought up the lease of it, but with notice of the restrictive covenant relating to the first lot; the Master of the Rolls held, that in Equity he was bound by the covenant; and also that on the construction of the covenant on the part of the lessor, not to "let" any house or any land for the erection of any house to be used as an hotel, the lessor, and those who claimed under him, could not allow any of his land to be used for that purpose (3).

7. Where A. and B., owners of an estate, had laid it out for

- (1) *Ingram v. Morecraft*, 33 Beav. 119; see this case upon appeal, pl. 2. 49. (3) *Jay v. Richardson*, 30 Beav. 563.
(2) *Wilkinson v. Rogers*, 12 W. R. 563.

building purposes, and devoted a portion of it to roads, and on a partition of the estate the soil of the roads had been vested in A., who covenanted that the owners and occupiers of all the land should have the full use and enjoyment of the roads "as if the same were public roads;" the Master of the Rolls held, that though the roads were not actually dedicated to the public, yet that a district gas company, upon the requisition of the owners and occupiers of some of the villas built upon the land, without the consent of the other owners and occupiers, had a right under the Gasworks Clauses Act, 1847, to break the soil of the roads to lay down their mains without the assent of A. or his devisees; and that, whether the roads were public or private, the devisees of A. were bound by his covenant, and that the occupiers of the villas were entitled to have gas laid on to the houses, and that a bill filed to restrain the company from breaking up the roads, &c., must be dismissed with costs; and on appeal this decision was affirmed, on the ground that every occupier had the same right, for the purpose of his use and enjoyment, to call in all such aid as he might have done if the roads had been public roads; but the appeal was dismissed without costs, on the ground that the Lords Justices differed to some extent in their views as to the construction of the covenant in the deed (1).

8. Where a deed contains an absolute covenant not to do an act, such covenant will not, in the absence of a bill to rectify the deed, be controlled by a recital in the deed from which it appears that the parties intended that such act might be done on payment of a fixed sum for liquidated damages; and Vice-Chancellor Sir W. P. Wood granted an interlocutory injunction to restrain acting against the words of the covenant (2); but a covenant in a deed, if ambiguous, will be controlled by the recitals (3).

9. The mere power of re-entry for a breach of a covenant does not preclude a lessor from coming to a Court of Equity to restrain the commission of the breach, nor is he bound to adopt his remedy of re-entry (4).

Absolute covenants are not controlled by recitals—ambiguous covenants are.

Breach of covenant can be restrained, though a power of re-entry.

(1) *Selby v. Crystal Palace Gas Company*, 30 Beav. 606; 31 L. J. (N. S.) 595; 8 Jur. (N. S.) 830.

(2) *Bird v. Lake*, 1 H. & M. 111.

(3) *Selby v. Crystal Palace Gas Company*, 30 Beav. 606.

(4) *Parker v. Whyte*, 32 L. J. (Ch.) 520, V.-C. W.

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10. Where T., being in possession of a house on the understanding that a lease would be granted, underlet to B., and B. underlet to C., and in the lease subsequently granted was a covenant that neither T. nor her executors, administrators, nor permitted assigns, should permit any offensive trade to be carried on, nor underlet without license, and D., who had become tenant without the knowledge of T. subsequently to the date of the lease, carried on a mock auction, which being complained of by other tenants, the lessors filed a bill and moved for an injunction to restrain D. from carrying on the trade, and T. from permitting it to be carried on, or underletting without license; Vice-Chancellor Sir R. T. Kindersley, without deciding whether the mock auction, or the assembling of a number of persons about the door, came within the covenant, refused the motion as to T., with costs, on the ground that T. was under no stipulation not to underlet; that the plaintiff knew of the underletting, and had refused a written sanction on the ground that it was unnecessary; and, assuming the trade was offensive, that T. could not be restrained from what was already done and acquiesced in by the plaintiffs, there being no suggestion of an anticipated repetition of it; and the Vice-Chancellor said that the plaintiffs had mistaken their remedy, which—if it was a violation of the covenants—was by ejectment; and made no order as to D., who did not appear (1).

11. Where a lessee of a coal-mine had covenanted at the end of the term to yield up the works and mines, and all ways and roads, in such good repair, order, and condition, as that the works might be continued and carried on by the lessor, the Court of Appeal, reversing the decision of Vice-Chancellor Sir J. Stuart, held, that such covenant did not include wooden sleepers used for the purpose of a railway, which had been laid down by a sub-lessee, and dissolved an injunction against removing them, which had been granted by the Vice Chancellor against an execution creditor of the sub-lessee (2).

A party
making a re-
presentation
as to his want

12. If a representation is made by a party that he cannot, during the term of his lease, build otherwise than in a particular way, that representation he is bound to make good; and where

(1) *Moses v. Taylor*, 11 W. R. 81. W. R. 149; 31 L. J. (Ch.) 481; 1 L. T.

(2) *Beaufort (Duke) v. Bates*, 10 111.

the defendant held two plots of building-land, B. and C., under a building lease for 999 years, which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to houses on plot B. a sea-view over plot C., and H., having entered into a treaty with the defendant for an under-lease of B., made inquiries of the defendant as to what could be built on the land in front; and the defendant replied that he, the defendant, could not build on C. closer than thirty feet, as his lease did not allow it; and H., after having inspected the original lease, took an under-lease of B., containing a covenant by the defendant that he, his executors, administrators and assigns, would observe the lessee's covenants in the original lease; and the defendant afterwards surrendered his lease to the ground landlord, and took a new lease not containing the old restrictions, and commenced building on C. in a way which would obstruct the sea-view from houses on B. belonging to the plaintiff, who was the assignee of H.; the Court of Appeal, affirming the decision of Vice-Chancellor Sir W. P. Wood, held, that the rights of H., under the defendant's covenant to observe the covenants in the original lease, were not affected by the defendant's surrender of that lease, and that the plaintiff was on that ground entitled to an injunction to restrain the defendant from building in contravention of those covenants. And also, that even if by reason of the surrender the covenant was gone, the plaintiff was entitled to an injunction from the equity arising from the parol representation of the defendant, for that what the defendant had said to H. amounted to a representation that the defendant could not, during the term of the lease, build otherwise than in a particular way; and also, that the defendant having stood by while the sub-lessee laid out money on the faith of the representations he had made, could not be allowed to obtain an increased benefit to himself by surrendering his lease, so as to enable him to obstruct the sea-view of the sub-lessee. And the Court also held, that, notwithstanding the surrender, the covenant by the defendant in the sub-lease that he would observe the lessee's covenants contained in the original lease must be read as if such covenants had been introduced in the sub-lease; but that this covenant in the building lease by the lessor to perform all the covenants contained in the original lease

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of power to
build in a par-
ticular way is
bound
thereby.

Though a
covenant is
gone, there
may be an
equity from a
parol repre-
sentation.

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A conveyance to the use that certain trades shall not be carried on amounts to covenant, and injunction granted to restrain carrying on restricted trade.

was limited in its operations to the period during which the original lease was subsisting unsundered (1).

13. In *Hodson v. Coppard* (2) the Master of the Rolls held that a conveyance in fee to the use that certain trades should not be carried on upon the property, was binding. In this case the defendant's tenant carried on one of the restricted trades, and upon a bill by the plaintiff, against the defendant alone, for an injunction, the defendant insisted on his right to carry on the trade; but the Court granted a perpetual injunction against him, his servants and agents, as the conveyance to the above use amounted to a covenant not to carry on the restricted trades, but declined extending it to his tenant, he not being a party to the bill.

14. A covenant for perpetual renewal entered into by a person having a limited interest in lands, does not bind the estates, and therefore, if his assignee acquires the inheritance, it is not bound by the covenant (3).

15. Where a lessee of a mine had covenanted by his lease, at the end of the term, if the lessor should require it, to leave him all the engines, machinery, things, and materials which should have been used in and about the working of the mine, upon receiving twelve months' notice from the lessor, and being paid for the same according to a valuation, and in a subsequent part of the lease it was provided that it should be lawful for the lessee at any time or times during the term, or within twelve months after its expiration, to remove all the machinery, engines, things, and materials which should be erected or brought by him upon the premises, unless the lessor should be minded to purchase the same, which he should have liberty to do upon giving the notice therein before mentioned and upon paying the price estimated; and the lease also contained a covenant by the lessee not to do any act which might occasion, or tend to produce, the drowning of the mine; and fourteen years before the expiration of the term the lessee became insolvent, and assigned everything he had brought upon the premises to trustees, who gave notice to the lessor of their intention to remove the same, unless he should be minded to purchase. To

(1) *Piggott v. Stratton*, 1 De G. F. & J. 33; 1 Joh. 341; 6 Jur. (N. S.) 129.

(2) 29 Beav. 4; 7 Jur. (N. S.) 11.
(3) *Brereton v. Tushey*, 8 Ir. Ch. R. 190.

a bill by the lessor averring that such removal would occasion, or tend to produce, the drowning of the mine, and praying for an injunction to restrain the same until the end of the term, and until he had the opportunity of exercising his option to purchase; a demurrer was allowed, the Court being of opinion that, according to the true construction of the lease, the lessee was to be at liberty to remove all the property in question unless the lessor gave notice of his intention to purchase, and paid for the same (1).

16. In a case resting simply upon covenant, if the party seeking specific performance of a covenant, be in possession, he has a right to the enjoyment of the property *modo et formâ*, according to his covenant; but if he be entitled in remainder or in reversion only, he must shew that he has sustained some material or special damage by reason of the breach to entitle him to relief of this nature; and a Court of Equity will not, at the instance of a person having a mere reversionary interest in the freehold, interfere to restrain the breach of the covenant entered into by the tenant, with the lessor, against carrying on a business upon the demised premises, unless special or material damage is shewn. And where A., in 1839, had demised land on a building lease for ninety-nine years, with a condition not to carry on any "trade, business, or employment whatsoever" in any of the houses, but that the same should be occupied solely as a private dwelling-house; and by his will, in 1844, he devised the lands subject to the lease to one for life, with remainder to the plaintiff, and in 1854 one of the houses was occupied as a school, and the tenant for life refused to interfere, and thereupon a bill was filed by the remainderman to prevent the premises from being occupied otherwise than according to the lease, *i.e.*, as a private dwelling-house; and it appeared that there were other schools in the neighbourhood, but it did not appear that the testator had sanctioned any breach or waiver of the covenant; Vice-Chancellor Sir W. P. Wood held, that the remainderman could not have any remedy on the mere ground of infraction of a special agreement, but must shew special damage by reason of such infraction; and being of opinion that no material or substantial damage to the plaintiff had been established, and no case of waste, but only a possibility of the respectability of the

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A party in possession is entitled to a specific performance of a covenant, parties entitled in remainder or reversion must shew material or special damage by breach.

(1) *Rollston v. New*, 4 K. & J. 640.

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Acquiescence in lesser violation, is objection to interlocutory injunction on greater violation.

neighbourhood being in some measure affected, the bill was dismissed with costs (1); but *semble*, if there had been any injury to the material of the house and premises; or if a grossly noxious trade had been carried on, the plaintiff might be entitled to relief, although claiming in remainder only, and not in possession (2).

17. In *Child v. Douglas* (3) the Lords Justices held, that acquiescence in the violation of a covenant to a certain extent, was a sufficient objection to an interlocutory application for an injunction against a greater violation of it (4).

18. On a motion for an injunction to restrain an alleged breach of covenant, if the question in dispute appears doubtful, the burden of proof is on the plaintiff, to shew that the balance of convenience is in favour of granting the injunction (5).

19. Where G. and C., having a power to appoint in fee simple over lands near a town, which stood limited (subject to such power of appointment) to G. and C., successively and in strict settlement, and there being also a power of sale over all the property, to be exercised at the request of G. and C., and the survivor, appointed in 1845 a plot of the land to the defendant in fee, with a covenant by him, his heirs and assigns, with G. and C., their heirs and assigns, not to build within — feet of a particular line; and in the contract for sale which preceded the conveyance the distance was stated to be six feet; and in 1853 (C. having died) an adjoining plot, in a line with the first, from which it was separated by a narrow street, was conveyed, under the power of sale, by the direction of G. to the plaintiff in fee, under a like covenant not to build within six feet of the front line; and in 1855 the plaintiff opened a window into the street which separated his plot from the defendant's plot, thereby commanding the defendant's front door; and the defendant thereupon commenced raising a wall which he had already, before 1853, built to the height of five feet, intending to raise it to fifteen feet, and it appeared that the plaintiff had built his own house so that the foundations, to the height of a foot from the ground, encroached on the distance of six feet mentioned in his own conveyance, and the ornamental work on his main door encroached one foot on the six feet; Vice-Chancellor Sir W. P.

(1) *Johnstone v. Hall*, 2 K. & J. 414; 2 Jur. (N. S.) 780; 25 L. J. (Ch.) 462.

(2) 1b.

(3) 5 De G. M. & G. 739.

(4) 1b.

(5) 1b.

Wood held, on a bill by the plaintiff to restrain the further raising the wall to fifteen feet, that the plaintiff's own encroachments were immaterial, and did not interfere with the enjoyment of others, and did not disentitle him to complain of the infringement, if any, by the defendant; and that the omission in the defendant's covenant, leaving the number of feet on which no building was to be erected, was immaterial, it being shewn, in the judgment of the Court, to be an accident which the vendor could have come to have remedied; and the plaintiff, if entitled to any relief at all, being entitled to have such remedies as the vendor might have had; and that the conveyances to the plaintiff and the defendant having been made in point of form in different ways, and by different persons, the vendors having been substantially the same in both instances, did not affect the plaintiff's right to relief in Equity against the breach of the covenant; that the erection of the wall was a breach of the defendant's conveyance to him, but that it was not broken by the projection a few inches too far of the lower part of the wall of a house, nor by a brick porch which came forward one foot within the limit; and that a subsequent purchaser of a neighbouring portion of the land might obtain an injunction against the first purchaser to restrain him from infringing his covenant, and this whether the plaintiff at the time of his purchase knew of the existence of the defendant's covenant or not, as the plaintiff must be taken to have bought all the rights connected with this portion of the land, especially if he has bound himself by a similar covenant; and it is no objection in such a case that the vendor has not entered into reciprocal covenants with the purchaser, such as to subject the purchasers of the remaining land to like obligations respecting their plots, for the conveyance of the land was a sufficient reciprocal advantage to support the covenant; nor does it matter that the plaintiff or defendant, or both, are assigns of the original parties to the covenant sought to be enforced, for the covenantee must be taken to have assigned the benefit of the covenant with each portion of the remaining land, and the assign of the covenantor is bound in Equity if he had notice of the covenant; and the equity is the same where the vendors of a plot of land to the first purchaser conveyed to him by the exercise of a general power of appointment under a settlement, and the person seeking

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to restrain a breach of the covenant is one of the persons entitled to the rest of the land under the limitations in the settlement in default of appointment, or is the assign of either of such persons, or any appointee under a power of sale and exchange contained in the settlement by way of proviso in the usual form, and whether he is such an assign or appointee of the whole or of any part only of the remaining land; and the original vendors, or their assigns, not having taken proceedings against the first purchaser, who had built upon his land in such a manner that it was very doubtful whether or not he had thereby broken his covenant; the Court held, that this was not such an acquiescence as would prejudice their right to restrain a breach of the covenant; and the distance from the road within which building was prohibited being left in blank in the covenant in the deed, not being expressed in the previous written contract, and it being proved that the blank had been left by the direction of the clerk of the vendor's solicitor, not their authorized agent, and that there was no intention to depart in the deed from the terms of the contract, and the clerk having declined to give evidence concerning the matter; the Court held, that relief might be given as though the covenant in the deed had been perfect, and in accordance with the contract; but that the defect must be confessed and avoided in the bill, and that no relief could be given where the bill stated the covenant as though it contained no blank, and the real fact only appeared upon the affidavits, and subsequently upon the amendment of the bill; the injunction was obtained without having the deed rectified, and without making the covenantee a party to the suit (1).

The Court will grant relief, although plaintiff not clearly entitled to damages if there has been an agreement to the benefit of which plaintiff is entitled.

The right to enforce the benefit of a covenant passes to alienee without specific mention.

20. The Court will entertain a bill in a proper case, although filed by a person not clearly entitled to sue for damages at Law, if it be established that a substantial agreement was entered into, to the benefit of which the plaintiff is, in Equity, entitled (2). And the right to enforce in Equity the benefit of a covenant affecting the enjoyment of land will pass to the alienee of that land without being specifically mentioned in the instrument of alienation. But the Court expressing a doubt whether, where there are two

(1) *Child v. Douglas*, 1 Kay, 560, appeal, 5 De G. M. & G. 739; *ante*, pl. 17. 575; 2 Jur. (N.S.) 350; *et v. S. C.* on (2) *lb.*

alienees of land, each of whom covenants with his vendor respecting the mode of enjoyment of that land, and also whether, where the alienees neither covenant with each other, nor take any engagement with the vendor; in such cases either alienee has any remedy against the other infringing the covenant; it therefore, on the whole, dismissed the bill, but without costs (1).

21. Where the construction of a contract is clear, and the breach clear, it is not a question of damage, but the mere circumstance of the breach of contract affords sufficient ground for the Court to interfere by injunction (2); and, *semble*, the Court may so interfere whether the breach has or has not actually been committed, provided the defendant claims and insists on a right to do the act which would constitute such breach; and where the defendants had demised to the plaintiff a plot of land, one half of an adjoining brook, a cotton mill, reservoir, and steam-engine of 100 horse-power, on the plot of land, and the use of a weir below the mill, for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook, at a bridge above the mill; "and the free use and enjoyment of so much of the stream of water which usually flowed down the brook adjoining the plot of land, as should be necessary for effectually supplying with water and working the steam-engine, or any other steam-engine of like power and capacity;" and covenanted not to construct any other weir or dam between the weir and bridge, and for quiet enjoyment of the premises, according to the tenor of the demise, and shortly afterwards the defendants erected, a little below the bridge, but above the plaintiff's mill, a new cotton mill and steam-engine, with a reservoir, which drew off water from the brook between the plaintiff's reservoir and the bridge, and they discharged the heated water which they had used for their new mill into the brook, whereby on one occasion they raised the temperature of the water which the plaintiff had to use for condensing his engine from 57° to 68°; and all the engineering witnesses agreed that every additional degree of heat above 41° renders water less fit for condensing purposes; and it was also deposed, that on another occasion, in

Where construction of contract, and also breach, are clear, injunction granted.

(1) *Child v. Douglas*, 1 Kay, 560, 575; 2 Jur. (N. S.) 350; *et v. S. C.* on appeal, 5 De G. M. & G. 739; *ante*, pl. 17. (2) *Tipping v. Eckersley*, 2 K. & J. 264.

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consequence of the increased temperature, the plaintiff's engine worked "nearly half a stroke per minute less" than the usual rate of twenty-eight strokes per minute; upon a motion for a decree, Vice-Chancellor Sir W. P. Wood granted a perpetual injunction restraining the defendants from discharging heated water so as to increase the temperature of the water which the plaintiff used for condensing; being of opinion that the evidence, exclusive of that as to the actual diminution in the working of the engine, shewed a material interference with the quality of the water to which the plaintiff was entitled under the demise, and that the question whether such interference was such as to give him a right to damages was one which he was not obliged to try. But so much of the motion as sought to restrain the defendants from diverting the water for their new mill was directed to stand over, upon terms of the plaintiff bringing an action, the plaintiff having failed to shew that he had ever yet been deprived by the defendants of the quantity of water necessary for effectually supplying and working his engine, although it appeared that he had great reason to fear that he would be so deprived (1).

22. Where a vendor had conveyed to a purchaser a piece of land with a house, being No. 7 in a particular row of houses called W. Terrace, on the west side of a road, and had covenanted with the purchaser that no building, except monuments and tombs, should be erected on any part of the land belonging to the vendor "lying on the east side of the said terrace, and opposite to the plot of land thereby conveyed," the Lords Justices held (affirming the decision of Vice-Chancellor Sir W. P. Wood), that the covenant applied only to that part of the vendor's land which was opposite to, and of the same width as, the piece conveyed; and according to *Tulk v. Moohay* (2), if parties purchase land with notice of a covenant concerning it, but which does not run with the land so as to bind them at Law, Equity will not permit them to do anything contrary to the true meaning of that covenant (3).

23. Where the plaintiff in April, 1842, had purchased for £180 of the defendant, a freehold property, and had taken a conveyance

Purchaser of land with notice of covenant concerning the land, not running with the land, is bound in Equity.

(1) *Tipping v. Eckersley*, 2 K. & J. 264.

(2) 2 Ph. 774.

(3) *Patching v. Dubbins*, 23 L. J. (Ch.) 45; 1 Kay, 1; 17 Jur. 1113.

thereof, in which there were no covenants for title, but which contained a covenant for quiet enjoyment by the vendor, and in the same month the plaintiff mortgaged the property to secure £200 and interest, and in 1846, after defending an action in ejectment, was evicted by the verdict of the jury, and the plaintiff then brought an action for damages upon the covenant against the defendant, but was stopped in such action by a plea, on the part of the defendant, that at the date of the eviction the legal estate in the premises was not in the plaintiff, but in the mortgagee, and shortly afterwards the defendant paid off the mortgagee, taking from him the mortgage deed, and acknowledgment, by indorsement thereon, of the receipt of the mortgage money and interest from the defendant, and that the same was in full satisfaction and discharge of the mortgage debt, and of all right of action or demand on the part of the mortgagee against the defendant under the covenant contained in the deed of conveyance to the Plaintiff; upon a bill being then filed by the plaintiff against the defendant, praying that the plaintiff might be declared entitled to the benefit of the covenant for quiet enjoyment, and for a reference to the Master to assess the damage sustained by the plaintiff in consequence of the breach of such covenant, the Lords Justices held, upon appeal, reversing the decision of the Court below, that the plaintiff had clearly a right to have such damages assessed, and gave him leave to bring an action upon the covenant within a time limited in the order, at the same time restraining the defendant from setting up the mortgage deed, or the indorsement thereon, by way of defence to such action (1).

24. Where A., being seised of the centre garden and some houses in Leicester Square, had conveyed the garden to B. in fee, and B. had covenanted for himself and his assigns to keep the garden unbuilt upon, &c.; the Court of Appeal held, affirming the decision of the Court below, that a purchaser from B. with notice of the covenant, was bound by it in Equity, whether he was bound at Law or not, and an injunction was granted to restrain him from infringing the covenant (2).

Purchaser of fee simple with notice of covenant by vendor, bound in Equity.

25. Where the owner of an estate covered it with houses, and Carrying on

(1) *Thornton v. Court*, 17 Jur. 151. 2 Ph. 774; 1 H. & T. 105; (*et v. this*

(2) *Tulk v. Moxhay*, 11 Beav. 571; case, pl. 37, post).

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girls' school
breach of cove-
nant (here).

sold some of them subject to a covenant not to carry on any trade, business, or calling therein, or to otherwise use, or suffer the same to be used, to the annoyance, nuisance, or injury of any of the houses on the estate, the Court held, that the carrying on of a girls' school in one of the houses was a breach of the covenant, and that the covenantee had not waived the benefit of the covenant though he had permitted other houses, held under the like covenant, to be used as schools (1).

Lessee re-
strained
though a
penalty for
breach of cove-
nant.

26. Where a lessee, in Ireland, covenanted not to burn any part of the demised premises, under the penalty of £10 per acre, to be recovered as the additional rent, for every acre so burned, the Court held, that he was not entitled to burn upon payment of the specified sum as liquidated damages, and that the jurisdiction of Equity to grant an injunction to restrain the lessee from burning was not ousted by the imposition of the penalty (2); and in *Barrett v. Blagrove* (3) the Court granted an injunction to restrain a breach of covenant, where the covenant was secured by forfeiture of the lease and a penalty; the Lord Chancellor said it was in the nature of specific performance, and that the breach of the agreement might consist in repeated acts.

Acquiescence
in partial de-
viation and
laches (here)
disentitled to
injunction.

27. In *Roper v. Williams* (4), the Court refused an injunction to restrain the breach of a covenant that buildings shall be erected upon a general plan; the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the Court (5); and a landlord who relaxes in favour of some of his tenants a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant (6).

Distinction
between ex-
press covenant
and implied
agreement.

28. There is a distinction between an express covenant and an implied agreement as regards enforcing the same by an injunction; an injunction will be granted in the former instance, but not in the latter, against a tenant removing articles contrary to the custom of the country. The destruction of a dove-cote is waste, and an injunction was accordingly granted to restrain the destruction, but

(1) *Kemp v. Sober*, 1 Sim. (N. S.) 517.

(2) *French v. Macnabe*, 2 D. & War. 269; 1 Con. & L. 459.

(3) 5 Ves. 555.

(4) T. & R. 18.

(5) Ib.

(6) Ib.

refused as to presses, *eo nomine*, if not fixed to the freehold, in which case it would be waste (1).

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29. Where a lessee of a mill and steam-engine had covenanted to repair, reasonable wear and tear excepted, and during the lease he had added both to the height and extent of the mill, and had removed all the works of the engine, except the fly-wheel, shaft, and boiler, and had attached to them a new engine of greater power, the Court granted an injunction to restrain the assignees of the lessee, who had become bankrupt, from removing the parts of the new building and the new parts of the engine, subject to an action to be brought by the lessors to try the rights (2).

30. Where a receiver had been appointed over premises held under a lease containing a covenant declaring the lease void in certain events therein specified, and a tenant held under a sub-lease containing a similar covenant; the Court, upon motion by the receiver, restrained the tenant under the sub-lease from doing an act whereby the title of his lessor might be evicted (3).

Sub-lessee restrained doing acts to endanger title of his lessor.

31. In *London (Mayor of) v. Hedger* (4) it was held on demurrer that a covenant to repair, and at the end of the term to surrender the buildings in good condition, does not preclude an injunction against pulling them down and carrying away materials just before the end of the term.

32. In *Fleming v. Snook* (5) the Court granted an injunction to restrain the breach of a farming covenant; and a covenant in the farming lease not to sow with more than two grain crops during four years, was held to apply to any four years of the term however taken, and not to each successive four years from the commencement. And in *Drury v. Mollins* (6) the Court granted an injunction against ploughing up pasture upon a covenant to manage pasture in a husbandlike manner, the Lord Chancellor saying that he thought that equivalent to an express covenant not to convert pasture to arable. So, in *Lord de Wilton v. Saxon* (7), the Court granted an injunction to restrain a tenant to the plaintiff

Injunction to restrain breach of farming covenants.

(1) *Kimpton v. Eve*, 2 V. & B. 349.

(5) 5 Beav. 250.

(2) *Sunderland v. Newton*, 3 Sim.

(6) 6 Ves. 328.

450; see *Kimpton v. Eve*, 2 V. & B. 349.

(7) 6 Ves. 106; *v. Pulleney v. Shelton*,

(3) *Mason v. Mason*, Fl. & R. 429.

5 Ves. 147, 260, n.; and *Hovenden's*
Sup. to Ves. 497.

(4) 18 Ves. 355.

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from ploughing up meadow for the purpose of building, on the ground that it was contrary to an express covenant in his lease not to convert any meadow, otherwise the Lord Chancellor doubted whether the Court would grant an injunction on the ground of waste, if there were no covenant, without evidence that it was an ancient meadow.

Tenant from
year to year
restrained
cutting hedge-
rows, &c.

33. The Court will grant an injunction to restrain a tenant from year to year (in this case) under notice to quit, as in the case of a lessee for a longer term, from doing damage by cutting and damaging the hedge-rows, &c., and from removing the crops, manure, &c., contrary to the usual course of husbandry, and except according to the custom of the country (1).

Cases where
injunction
refused,
damages being
stipulated.

34. Where in a lease for years of land, the lessee covenanted not to plough pasture land, and if he did, then to pay after the rate of 20s. per annum for every acre ploughed; the Court refused an injunction against the tenant's ploughing, on the ground that the parties themselves had agreed the damage, and had set a price for ploughing, and declared that if the defendant was plaintiff against paying 20s. per acre for ploughing, the Court would not relieve him (2). And so in *Rolfe v. Paterson* (3), where a lessee covenanted not to plough up, and if he did to pay £5 additional rent per acre, it was held to be stipulated damages, and that Equity had no jurisdiction. And in *Forbes v. Carney* (4) the Court refused an injunction to restrain a tenant from breaking up land contrary to his covenant, where the parties had ascertained the damages.

However the
Court restrains
breaches
though a
penalty.

However, in *French v. Macabe* (5) it is laid down that where a covenant is not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, this penalty does not authorize the party to do the act, and before the act is done, that the Court will restrain him by injunction, but that if the act is done, the penalty must be paid, and that the amount is unimportant.

35. Where land for building on was intended to be sold by lots, and on the sale of the two lots first sold an indenture was executed by the owner and the two purchasers whereby, after declaring that

(1) *Onslow v. —*, 16 Ves. 173; *v. Geust v. Lord Belfast*, 3 Anstr. 749, n. (4) Wall. Lyn. 38.
(2) *Woodward v. Gyles*, 2 Vern. 119. (5) 2 D. & War. 269; 1 Con. & L. 559; *et v. Barrett v. Blagrove*, 5 Ves. 555.
(3) 2 Bro. P. C. 436.

it should be an indispensable condition of the sale of any part of the land that the proprietors for the time being should observe the covenants and restrictions of the indenture, and the parties thereto covenanted, among other things, that none of the proprietors for the time being should ever use as an hotel, or carry on the business of an innkeeper in, a house erected on any of the lots, and the purchasers of two other lots afterwards executed the deed, and then sold their lots, the one to A., the other to B., neither of whom executed the deed, but both had notice of it; B. and his tenant were restrained by injunction from using the house built on B.'s lot as a family hotel, on the ground that the covenant was binding in Equity upon an assignee of a covenantor who purchased with notice of the deed (1); and so where a purchaser in fee covenanted that no building whatever should at any time thereafter be erected on a certain portion, which latter was afterwards, and after one mesne conveyance, vested in the defendant, who, before the conveyance to him, had notice of the covenant, the Court, at the instance of the plaintiff, who had afterwards divers mesne conveyances of the other portions, restrained the defendant from continuing a building begun by him (2).

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Assignee of
covenantor,
with notice, is
bound by the
covenant.

36. Where land is conveyed in fee by deed of feoffment, subject to a perpetual ground-rent, and the feoffee covenants for himself, his heirs and assigns, with the feoffor, the owner of adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands that, with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a Court of Equity will not interpose to enforce the covenant, but will leave the parties to Law. Whether upon such a covenant there could be any remedy at Law against the assignees of the covenantor, *quære* (3).

If subsequent
acts of cove-
nantee alter
character of
the lands, so
as the restric-
tion no longer
applicable—
no injunction.

37. A covenant, though in gross at Law, being one that does not Covenants in,

- (1) *Whatman v. Gibson*, 9 Sim. 196; 10 Jur. 650.
7 L. J. (N. S.) Ch. 160; 2 Jur. 273. (3) *Duke of Bedford v. Trustees of*
(2) *Maim v. Stephens*, 15 Sim. 377; *British Museum*, 2 My. & K. 552.

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though gross
at Law, are
binding in
Equity, with
notice.

run with the land so as to be binding at Law upon a purchaser from the covenantor, is nevertheless binding in Equity upon an assignee with notice; and where, in 1808, the plaintiff was the owner in fee simple of a piece of ground forming a public square in London, and also of several houses in the square, and in the same year he conveyed the piece of ground, by the description of "Leicester Square Garden, or pleasure ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stonework round the same," to E. in fee simple, and E. covenanted for himself, his heirs, executors, administrators, and assigns, with the plaintiff, his heirs, executors, and administrators, to keep the piece of ground, and the iron railing round the same, in its then present form, and in proper repair, as a pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that the plaintiff and his tenants, inhabitants of the square, might, on the payment of a reasonable rent for the same, have keys at their own expense, and the privilege of admission therewith at any time into the pleasure ground, and the neighbourhood of the square had become thickly populated, and a thoroughfare had been made through it by Act of Parliament, and the piece of ground had become greatly neglected, and was in a ruinous condition, and for many years neither the plaintiff nor his tenants had used, or claimed to use, it as a pleasure garden, and the defendant, whose purchase-deed contained no similar covenant with his vendor, but who admitted that he had purchased with notice of the above covenant in the deed of 1808, and who claimed by purchase under E., removed some of the iron railings, and intended to make footpaths across the ground, and claimed the right of building thereon; the Court held that this was a breach of the covenant, and he was restrained by injunction, although the plaintiff had not established the validity of the covenant at Law as binding upon the assignee of the land; Lord Chancellor Cottenham observing that the question was, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased; and said that Lord Brougham, in *Keppell v. Bailey* (1), never could have meant

(1) 2 My. & K. 547.

to lay down that this Court would not enforce an equity attached to the land by the owner, unless under such circumstances as would maintain an action at law; and that, if that were the result of his observations, he could only say that he could not coincide with it (1).

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38. Where there was a covenant, upon a conveyance in fee of premises, with a well in front, with the grantors, who were also lessees of waterworks near, not to sell or dispose of water from a well to the injury of the proprietors of the said waterworks, their heirs, executors, administrators, and assigns, the parties were left to make what they could of the covenant at Law, and a demurrer was allowed to the bill, Lord Eldon observing that he never met with such a covenant, upon which he must try in each instance whether the act of selling the specified quantity of water was a prejudice to the proprietors of the waterworks; and, further, that the questions were, first, whether this was a covenant running with the land; secondly, whether the assignees, if named, could have the benefit of it; and thirdly, whether this covenant, if it did run with the land, would not be destroyed by every new lease; and, fourthly—and this was open to much argument—whether, with reference to motives of public policy, a Court of Equity would act upon such a covenant (2).

39. Where C. let a building lease for sixty-one years to W., who assigned it to the plaintiff for the remainder of his term, and he rebuilt the house, and laid out £5000 for that purpose, and paid the reserved rent of £40 per annum to C. till he died, and on his

Remainder-
man lying by
and receiving
rent, re-
strained.

(1) *Tulk v. Mozhay*, 2 Ph. 774; 1 H. & T. 105, affirming S. C. 11 Beav. 571.

(2) *Collins v. Plumb*, 16 Ves. 454. A covenant between a lessor and lessee, for themselves and their assigns, to do any matter which concerns the lands demised, falls within the rule laid down in *Spencer's Case*, 5 Rep. 17; and in *Balby v. Wells*, 3 Wils. 26, 29, 32; S. C. Wilmot's Notes, 344, 345, 349, as well as in the *Mayor of Congleton v. Pattison*, 10 East, 135; and must be considered as a covenant that runs with the land. The respective assignees of

the parties, therefore, will have the benefit of, and be bound by, all such covenants; *Vernon v. Smith*, 5 B. & A. 7, 11; and see the *Anonymous Case*, Moor, 159, pl. 300. But the interference of Equity in such cases is discretionary, though a Court of Equity has, no doubt, the power to restrain and enjoin, for the very purpose of preventing the necessity of resorting to an action of covenant; but this jurisdiction will only be exercised upon just occasions, and to prevent wanton or fraudulent vexation: *Waters v. Taylor*, 2 V. & B. 302 (2 Hov. Sup. to Ves. 454).

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death the defendant became entitled as first remainderman in tail, and, as such, claimed the estate by purchase, and was not bound by the lease, but for six years received the rent, and lay by and suffered the rebuilding, and did not by his answer deny that he had notice of it, and then brought an ejectment, and recovered at Law, for want of the usual covenants in the building lease, and the plaintiff brought an injunction bill to be quieted in possession, Lord Chancellor Hardwicke decreed a new lease, with proper covenants, and the plaintiff to hold the premises for the remainder of the term, but no costs to be paid on either side (1).

40. Notwithstanding some early cases (2) which allowed an injunction against an action for rent where the premises had been accidentally burned, a tenant covenanting to repair (damage by fire only excepted) continues liable to payment of rent notwithstanding the premises are destroyed by fire; and if he covenant to pay rent during the term, it must be paid, notwithstanding the premises are burned down during the term (3). The fact of the premises being insured makes no difference. The tenant has no equity to compel the landlord to expend the insurance money in rebuilding the premises, or to restrain him from suing for the rent until the premises are rebuilt (4).

41. Where there was a lease for twenty-one years, at £1 rent, with a covenant to tenants to renew from twenty-one years to twenty-one years, to make up ninety-nine years, and at the expiration of the first term, there being an arrear of rent due, and no application for renewal, the lessor brought an ejectment, and obtained judgment and possession, upon a bill filed for renewal (accounting for the delay), on payment of the arrear and interest, it was decreed (5).

42. A covenant in a lease not to let, set, or demise the premises, or any part, for all or any part of the term, without consent, restrains assignment (6); and the Court will enforce by injunction

(1) *Stiles v. Cooper*, 3 Atk. 692.

Adams, 33 L. J. (Ch.) 639; *Fowler v.*

(2) *Camden v. Morton*, 2 Ed. 218;

Bott, 6 Mass. 67 (Amr.)

Brown v. Quilter, 2 Amb. 619; 2 Ed.

(4) *Leeds v. Cheetham*, 1 Sim. 146.

218; *Steel v. Wright*, 1 T. R. 708.

(5) *Rawston v. Bentley*, 4 Bro. C. C.

(3) *Hare v. Groves*, 3 Anstr. 687;

415.

Holtzapfel v. Baker, 18 Ves. 115;

(6) *Greenaway v. Adams*, 12 Ves.

Gregg v. Coates, 23 Beav. 33; *Poole v.*

395.

a covenant in a lease not to assign without license (1); and such covenants not to assign, underlet, or otherwise part with the possession without consent in writing of the lessor, touch and concern the land, and therefore run with the land, and the lessor can sue an assignee of the lessee for a breach (2).

43. In *Macher v. Foundling Hospital* (3), upon a covenant against using premises as a shop or warehouse for any trade, without license in writing, or permitting anything which might grow to the annoyance or damage of the lessors, or any of their other tenants, of which covenant there was a breach, though not a nuisance in Law, public or private, being an annoyance, the Court refused protection by an injunction against entering up judgment and taking out execution in ejectment for breaches of covenant, there being no license, and said that the permission of one trade would not raise an inference that the lessee might afterwards carry on any other, nor would the Court enter into a comparison which trade was more or less offensive than others; but the Court added that the real question was, whether, from the circumstance of notice to some of the members, the corporation could be considered as bound, having stood by permitting expenditure, and recommending some arrangement that would be satisfactory without turning the plaintiff out of possession pending looking into the answer by the Court as to the point of permitting the expenditure; and the Lord Chancellor Eldon added, that upon a covenant not to assign without license, once dispensed with, the condition is gone in Law (4), and that Equity had followed that (5); yet he should not have thought it a very good decision originally, and he thought that he ought to hesitate to say, that if the license is to be in writing, a mere act, not establishing whether the party meant a license general or particular, should be taken to be a general license.

44. Where lessee for years under a restriction of alienation, and power of re-entry in such case, died, and his executors entered and enjoyed, and then became bankrupt, and the assignee sold this

(1) *Dyke v. Taylor*, 3 De G. F. & J. 467.

(2) *Williams v. Earle*, L. R. 3 Q. B. 739.

(3) 1 V. & B. 188.

(4) *Dumpon's Case*, 4 Co. 119; (but see now 22 & 23 Vict. c. 35, ss. 1, 2, 3, and 23 & 24 Vict. c. 38, s. 6).

(5) *Brummell v. MacPherson*, 14 Ves. 173.

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lease to the plaintiff for £50, and the lessor, insisting upon the forfeiture, ejected him; *per Curiam*, the Commissioners' assignment, being by authority of a statute, superseded the private agreement, and the assignment by the assignees to the plaintiff was no breach of the condition, but good; and so in *Philpot v. Hoare* (1), *Doe v. Beavan* (2), and *Doe v. Carter* (3), it was held that an assignment *by operation of law* is no breach of a condition not to assign, *ex. gr.*, if the lessee become bankrupt, or the lease be taken in execution, unless such an event be brought about by the fraudulent procurement of the lessee himself (4). But the lessor may, by the insertion of express, clear, and distinct words, render even such an assignment a fine or forfeiture (5).

45. The Court will grant no relief by injunction against a forfeiture for breach of a covenant to insure and to keep insured (6), or to pay the premiums and keep up a policy of insurance (7), and insurance after the breach has been committed has no effect in curing the breach (8). In *Green v. Bridges* (9) the Court would not restrain proceedings in ejectment where the breach of the covenant to insure was in respect of a lease of 999 years, at a rent of £31 18s. 6d., the actual annual value being admitted by the lessor to be £201 10s. But the Court has now been empowered by the 22 & 23 Vict. c. 35, ss. 4-9, to give relief against the breach of a covenant or condition to insure against loss or damage by fire, where no loss by fire has happened, and the breach has been committed through accident, mistake or otherwise, without fraud

Court relieves
against breach
of covenant to
insure against
fire.

(1) 2 Atk. 219.

(2) 3 M. & S. 353.

(3) 8 T. R. 57.

(4) *Doe v. Carter*, 8 T. R. 300; *v. Doe v. Hawkes*, 2 East, 481.

(5) *Doe d. Wyndham v. Carew*, 2 Q. B. 317; *Roe v. Galliers*, 2 T. R. 133; *Davis v. Eyton*, 7 Bing. 154; see *Doe v. Hawkes*, 2 East, 481; *Doe v. Clarke*, 8 East, 185; *Doe v. David*, 5 Tyrw. 125; *Cooper v. Wyatt*, 5 Madd. 482; *Yarnold v. Moorhouse*, 1 Russ. & My. 364; *R. v. Robinson*, Wigh. 386.

(6) *Green v. Bridges*, 4 Sim. 96; *White v. Warner*, 2 Mer. 459; *Rolfe v.*

Harris, 2 Price, 207, n.; *Reynolds v. Pitt*, 19 Ves. 140; *Elliott v. Turner*, 13 Sim. 477; *Gregory v. Wilson*, 9 Hare, 683; *Shearman v. Macgregor*, 11 Hare, 106; *Nokes v. Gibbon*, 3 Drew. 681; *Meek v. Carter*, 4 Jur. (N. S.) 992.

(7) *Winthrop v. Murray*, 8 Hare, 214.

(8) *Reynolds v. Pitt*, 19 Ves. 140; *Green v. Bridges*, 4 Sim. 96; *Elliott v. Turner*, 13 Sim. 477; *Gregory v. Wilson*, 9 Hare, 689; *Nokes v. Gibbon*, 3 Drew. 681; *Meek v. Carter*, 4 Jur. (N. S.) 992.

(9) 4 Sim. 96.

or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure, but the Court cannot relieve more than once in respect of the same covenant or condition; nor can relief be given where a forfeiture under the covenant has been already waived out of Court in favour of the person seeking the relief. Under this statute relief may be given for breaches of covenant committed after the passing of the Act, in leases granted before the statute (1). However, Equity will relieve against forfeiture, if the covenant to insure has been performed substantially, though it may not have been literally performed. At Law, a covenant by the lessee to insure in the name of the lessor only, is not performed by an insurance in the joint names of the lessor and the lessee, because the arrangement is not so beneficial to the landlord as the arrangement for which he had stipulated (2). But in Equity relief will be given against forfeiture where the manner in which the insurance has been effected is not so beneficial to the lessor as that for which he had stipulated, if the covenant has been on the whole substantially complied with; thus, in *Rogers v. Tudor* (3), there was a covenant in a lease that the lessee should insure in his own name and in the name of the lessor, in the Law Fire Insurance Office, or such other office as the lessor should fix on, and the lessee effected an insurance in his own name alone, without any communication with the lessor, in the Phoenix Office; but the Court held, that though this was not a literal performance of the obligation, the covenant to insure was substantially complied with, and that no forfeiture on which ejectment could be brought had taken place (4).

46. The Court will grant no relief against a covenant to repair in a given time, though there is no request by the landlord, unless there were a stipulation rendering it necessary, and though the tenant was suffered to continue in possession merely, without rent, &c., and though the specified time in the lease was inserted by mistake, as alleged by the plaintiff; and the *quantum* of

No relief
against cove-
nant to repair
in a given
time.

(1) *Page v. Bennett*, 2 Giff. 117; 6 Jur. (N. S.) 419.

(3) 6 Jur. (N. S.) 692.

(2) *Penniall v. Harborne*, 11 Q. B. 369; see *Havens v. Middleton*, 10 Hare, 641.

(4) See *Gregory v. Wilson*, 9 Hare, 683; *Lillie v. Legh*, 3 D. & J. 204; *Leather Company v. Brassey*, 8 Jur. (N. S.) 425.

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But reasonable
time allowed to
repair.

And relief
was granted to
a tenant of a
lunatic's
estate.

Relief against
breach if de-
fendant pre-
vents perform-
ance.

No relief for
breach of cov-
enant not to
assign without
license.
Semble, equit-
able charges
not a breach.

damage is no criterion (1). And a notice to quit does not absolve the tenant from the performance of the covenants in his lease (2); and although the parts out of repair had been rebuilt the Court would not interfere (3). But the Court will allow a reasonable time to repair (4). In *Ex parte Vaughan* (5) relief was given against ejectment by the committee of the lunatic's estate against a tenant on a forfeiture by breach of covenant to repair, on the ground that it would be an administration in Lunacy extremely prejudicial to the estates of lunatics, if too hard measures were adopted with the tenants, and that the question in this case was, whether this was a case in which a landlord acting for himself would not have taken advantage of the forfeiture. In *Stack v. Leonard* (6), on payment of damages arising from the non-performance of the covenants, the Court granted relief, after a verdict, against ejectment for breach; but this case must, it is presumed, be considered as overruled by the above cases.

47. A Court of Equity will not relieve against a wilful voluntary breach of covenant (7). But where a defendant prevents the plaintiff's performance of a covenant, a Court of Equity will remove the opposition (8).

48. The Court will grant no relief against a forfeiture by a breach of a covenant not to assign without license (9); but *semble*, equitable agreements giving charges upon the property comprised in a lease, not accompanied with a change of the possession, or other alteration in the property, will not, in Equity, work a forfeiture of a lease, notwithstanding there is a clause in the lease against assignment, if the acts which are relied upon as having worked a forfeiture can be got over by the plaintiff (10).

49. Where A. granted a lease for twenty-one years to B., with

(1) *Bracebridge v. Buckley*, 2 Price, 200; *Gregory v. Wilson*, 9 Hare, 689; *v. Bargent v. Thompson*, 4 Giff. 475.

(2) *Gregory v. Wilson*, 9 Hare, 683.

(3) *Job v. Banister*, 26 L. J. (Ch.) 125; 3 Jur. (N. S.) 93; *v. Guage v. Lockwood*, 2 F. & F. 115.

(4) *Ib.*

(5) 1 T. & R. 434.

(6) 9 Mod. 91 (*sed v. Reynolds v. Pitt*, 19 Ves. 141; and the other cases

in pl. 46, *ante*).

(7) *Descarlett v. Denett*, 9 Mod. 22.

(8) *Wood v. Tirrell*, Cary, 59.

(9) *Hill v. Barclay*, 18 Ves. 63;

Wafer v. Mocatto, 9 Mod. 112; *Lovat*

v. Lord Ranelagh, 3 V. & B. 24; *v.*

Burke v. Prior, 15 Ir. Ch. Rep. 106.

(10) *Bowser v. Colby*, 1 Hare, 138;

Weatherall v. Geering, 12 Ves. 509;

Gourlay v. Duke of Somerset, 1 V. & B.

68; *Croft v. Lumky*, 6 H. L. C. 672.

a proviso determining the lease, and giving A. a right of re-entry on non-performance of any of the covenants in the lease, and A. covenanted that at the end of the term, if it should not be sooner determined by B.'s acts or defaults, he would grant to B. a lease for a further term of fourteen years, and B. paid all his rent, and continued in possession after the term had expired, and A. then brought an ejectment against him for breaches of covenant during the term, and B. filed a bill for a specific performance of the covenant to renew, and for an injunction to restrain the action, and A. in his answer set up the breaches of covenant, and denied having had notice of them till after the end of the term; the Court refused a motion for an injunction (1).

50. Where A., by deed, covenanted to lay out and preserve land in an ornamental manner, according to a certain plan, subject to such alteration as should be made or approved of by him, his heirs or assigns, and as should not destroy the general beauty of the design, and upon selling any part thereof to require purchasers to enter into a covenant not to erect any messuage thereon so as to lessen the value of those already erected, and B. agreed to purchase and build certain messuages in a line with each other, and consistent with the terms of the deed, on part of the land, and after B. had built and taken a conveyance of two of such messuages, in which he entered into covenants similar to those in his agreement, the agreement as to the remainder was cancelled, and the rest of the land conveyed to A., who had sold part of it to C., who commenced building several feet in advance of the line in which B. had built; the Court held, that A. had power to vary the details of the plan, and that a purchaser from B. of one of the messuages built by him, was not entitled to relief by injunction restraining C. from building in such manner (2).

51. Where there was a lease from dean and chapter, with a covenant not to make sale of or take any timber trees growing or to grow on a certain part of the premises, save for the necessary building or repairing, &c., of their cathedral church, or of the church buildings thereto belonging; upon a bill by the lessee to restrain the dean and chapter from selling or cutting, except for

(1) *Thompson v. Guyon*, 5 Sim. 65.

(2) *Schreiber v. Creed*, 10 Sim. 9; 8 L. J. (N. S.) Ch. 346; 3 Jur. 625.

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the purposes aforesaid, an injunction obtained on filing the bill was dissolved on the coming in of the answer stating that the whole of the timber was wanted for the purpose of repairs; the covenant not extending to deprive them of the right which they might have exercised independent of it; and deans and chapters not being liable to be restrained in cases of waste, either by prohibition or injunction, except in the Ecclesiastical Court, or at the suit of the Crown (1). And so the right to an injunction to restrain a bishop from wasting the property of the see resides in the Attorney-General suing on behalf of the Crown, the patron of bishoprics (2), and, possibly, to some extent in the metropolitan (3).

52. Where the lessor covenanted, at any time, upon the request of the lessee, to cause any quantity of square oak wood to be set out within some part of the lands that should be wanted for the benefit of the lessee, and to be used in the building intended to be made on the demised premises, and the lessee covenanted to pay and allow to the lessor interest for the total amount or value thereof after the rate of £1 for the value of every £100, and so in proportion for a greater or less quantity; on a bill by the assignees of the lease for an account of what was due to the defendant in respect of the breach of that covenant, and for an injunction to restrain proceedings in ejectment for the recovery of the premises on the ground of a breach of covenant, the Court overruled a general demurrer (4).

53. Where a breach of covenant is threatened, and has been partly executed, the Court, having jurisdiction to restrain the breach, will also award damages in respect of the executed breach (5).

54. Where a breach of covenant is proposed, the Court will not refuse to interfere on the ground that there has been a mistake on the part of both parties in the form of the covenants, or that the aggrieved party may have already permitted some other infringe-

Breach of covenant partly executed restrained, and damages for executed breach.

The Court will not refuse interference on the ground of mistake of

(1) *Wither v. Dean, &c. of Winchester*, 3 Mer. 421; *v. Herring v. Dean and Chapter of St. Paul's*, 3 Sw. 492.

(2) *Knight v. Moseley*, Amb. 176; *Jefferson v. Bishop of Durham*, 1 B. & P. 116-131; *Wither v. Dean and Chapter of Winchester*, 3 Mer. 427; *Earl Fitz-*

william v. Moore 3 Ir. Eq. 615.

(3) *Wither v. Dean and Chapter of Winchester*, 3 Mer. 427.

(4) *Pearson v. Hoghton*, 3 Y. & J. 413.

(5) *Hindley v. Emery*, 11 Jur. (N.S.) 874.

ment of the covenant, or on the ground of inconvenience to the public; Lord Justice Turner, affirming the decision of Vice-Chancellor Kindersley, granting an injunction to restrain a railway company building certain works for their line at variance with a covenant by the company; and before the Court would refuse to enforce a covenant, it must be clear that no substantial damage could arise from the breach of it (1). But Lord Justice Knight Bruce was against the injunction, on the ground of the "strange imprudence" of the covenant, and that the injunction must necessarily cause directly, such a great amount of evil and loss to the defendants, as to their private interests, and such a very serious amount of inconvenience and mischief to the public; and was of opinion that the matter should be left to Law, and the injunction dissolved without prejudice to any action the plaintiff might bring (2). In this case, A., an owner of land through which a company proposed to make a railway upon a viaduct, withdrew his opposition to the company's bill in Parliament in consideration of an agreement by the company not to erect on the land to be taken by them from him, within eighty feet from other premises in his possession, any building, "except their proposed railway," above the height of eighteen feet, and the bill passed, and a viaduct thirty feet high, part of which was within eighty feet from the plaintiff's premises, was erected on the land taken from A., and this viaduct was wide enough for, and carried two lines only; and subsequently to its erection a conveyance of A.'s land to the company was prepared and executed, which contained a covenant on the part of the company to the same effect (omitting only the exception as to the railway, then completed) as the provision in the agreement restraining buildings, and on the company afterwards beginning to build brick piers above the height of eighteen feet, within eighty feet of A.'s other premises, with a view to widening their viaduct so as to carry four lines instead of two, the Court granted an injunction to restrain the company from erecting any such buildings in breach of their covenant (3). And the circumstance that a work undertaken in breach of a valid

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both parties
in form of
covenant, or of
inconvenience
to the public;

(1) *Lloyd v. London Chatham and Dover Railway Company*, 34 L. J. (Ch.) 362. 401; 13 W. R. 698; 12 L. T. (N.S.)

(2) *Ib.*

(3) *Ib.*

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nor because
the work is of
great public
importance.

covenant is one of great public importance, is not sufficient to induce a Court of Equity to refuse to restrain the breach of covenant (1).

55. Where an owner of building ground upon which houses of uniform height and depth had been built, sold it in plots, and conveyed each plot in fee subject to a perpetual rent-charge; and each purchaser covenanted with the grantor not to build more than eight feet high in the garden next door to his house, and not to allow trees or buildings over that height upon land lying in view of his house; but in process of time tall trees were allowed to grow up, and cottages were built upon the latter land, and the party entitled to the benefit of the covenant, or those through whom he claimed, never interfered; Lord Chancellor Chelmsford, affirming a decision of the Master of the Rolls, held, that this non-interference could not operate to prevent his enforcing the covenant to restrain a building in the garden, and the Court held that upon a covenant not to build or allow trees to grow above a certain height, the object of which was to prevent obstruction of the view from certain houses, substantial injury was not requisite in order to enable the Court to interfere and restrain a breach of covenant, and that it was a breach of the covenant to erect any building above the prescribed height extending beyond the back of the house, though the ground upon which such building was erected had never been used as a garden, and that a person entitled to complain of such breach of covenant had not waived his right by a passive acquiescence in other breaches; and acquiescence in a breach of covenant not attended with substantial damage will not bar the right to restrain a subsequent breach so attended; and the Court also held, that the owner of one plot was entitled to maintain a suit to restrain a breach of covenant against the owner of another plot without making the other owners parties; and the Lord Chancellor also held, that, whether the covenants did or did not run with the land, a purchaser of one of the houses, with notice of the covenants, was bound by them in Equity; and in this case an injunction was granted, at the suit of the owner of one of the houses, restraining a breach of the covenants by the owner of another house, notwith-

Acquiescence
in a breach
without sub-
stantial
damage no
bar to restrain-
ing breach
with.

(1) *Lloyd v. London, Chatham and Dover Railway Company*, 34 L. J. (Ch.) 401; 13 W. R. 698; 12 L. T. (N. S.) 362.

standing that small breaches of the covenants by other owners had not been interfered with, and that he himself had committed a small breach (1).

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56. A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, though he has no reversion, and where an original lease of premises contained no covenant in restraint of a particular trade thereon, and C., the lessee, assigned the lease to W.; and the assignment contained a covenant in restraint of the trade or business of a hairdresser, and W. then sub-demised the premises to G.; and the sub-demise contained no reference to the original lease, but it did contain a covenant that G. should not carry on the particular trade without the consent of W. or his assigns, and W. assigned his interest in the term to H., and G. assigned his interest in the term to D., who sold it to S.; and when S. purchased from D. he was estopped by the conditions of sale from calling for any title earlier than the sub-demise to G., or any evidence as to W.'s power to make it, but S., however, applied to and obtained from H. his consent to carry on, and commenced carrying on, the particular trade on the premises; and S. had no actual notice of the covenant in the assignment till the day before filing a bill in a suit instituted by C. to restrain W. and S. from committing a breach of the covenant; the Master of the Rolls held, that the bill must be dismissed as against W., but that S. had constructive notice of the covenant, and must be restrained from committing a breach of it. To a suit to enforce such a covenant the original covenantor is not a proper party if he has parted with all his interest in the property, and is not any way in fault (2).

A restrictive covenant is enforceable where constructive notice, though covenantee has no reversion.

57. Where an estate was sold in lots, each lot consisting of a house and some adjacent land, and the fee was conveyed to the purchasers, who covenanted respectively with the vendors that the front or elevation of the houses should not be altered without the vendor's consent in writing, and that the premises should not be used as a public-house, beershop, temperance hotel, &c.; Vice-Chancellor Sir W. P. Wood held, that the vendors had not waived

(1) *Western v. MacDermott*, L. R. 2 Ch. 72; 35 L. J. 190; 36 L. J. (Ch.) 200; 35 L. J. (Ch.) 265.
(2) *Clements v. Welles*, L. R. 1 Eq. 76; 15 W. R. 265, L. R. 1 Eq. 499.

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Breach of
covenant
gradual and
not conspicu-
ous, re-
strained.

A yearly
tenant not
inquiring into
title is
affected with
notice.

their right to insist upon the observance of this covenant by forbearing for periods of six and nine months respectively from taking proceedings against two of the purchasers who sold beer upon their premises, but in such a way that the sale was not visible to the occupiers of the other houses; and that the conduct of the plaintiffs did not amount to such a degree of acquiescence and waiver as to preclude them from the right of enforcing the covenant; and that the breach of the covenant having been of a gradual and not of a conspicuous character, the Court would restrain it (1).

58. Where the owner of a freehold house had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beershop, and the house was afterwards let to the defendant as tenant from year to year without express notice of the covenant; the Lords Justices held, affirming the decision of Vice-Chancellor Sir W. P. Wood, that although the covenant might not at Law run with the land, the defendant was bound by it in Equity. The rule that a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, applies equally to a yearly tenant as to the purchaser of a greater interest (2); and *per* Lord Justice Turner, agreeing with Vice-Chancellor Sir W. P. Wood, a covenant by a purchaser of land, not naming his assigns, that no building erected on the land should be used as a beershop, does not run with the land so as to affect the defendant tenant from year to year, independently of any question whether he had notice of it or not, being a covenant, as the Lord Justice Turner thought, applying merely to the personal use and enjoyment of the land by the grantee, and not to the permanent user of the land itself; but Lord Justice Knight Bruce said that he pointedly abstained from giving an opinion as to the question whether the covenant ran with the land (3).

59. A person by taking out an excise license for the sale of beer not to be drunk on the premises, does not break a covenant not to use his house as a public-house for the sale of beer (4).

(1) *Mitchell v. Steward*, L. R. 1 Eq. 541; 35 L. J. (Ch.) 393; 14 L. T. (N. S.) 134. (2) *Wilson v. Hart*, L. R. 1 Ch. 463; 2 H. & M. 551; 12 L. J. (N. S.) 460. (3) *Ib.*

(4) *Pense v. Coates*, L. R. 2 Eq. 688.

60. Where a lessee, who has entered into a restrictive covenant as to user of premises, underlets to a person who, with his sanction, commits a breach of the covenant, he may properly be made a party to a suit for an injunction, and is liable for the costs (1).

61. Where a lease contained a covenant by the lessors to make a road, and power was reserved to the lessors to alter the roadway for a particular purpose, provided they made another, and grantees of the lessors proposing to alter the roadway, the Court held, that though the particular purpose specified in the covenant might not be their real motive, yet if they chose for its sake to do the particular act mentioned in the covenant, the lessee had no right to prevent their altering the roadway accordingly; and Lord Chancellor Chelmsford held, affirming the decision of Vice-Chancellor Sir R. T. Kindersley, that the lessors had power at any time to make the alteration and divert the road, although they might have made the alteration for the purpose of entitling themselves to divert the road, and that in this respect a power under a deed differs from a power conferred by Act of Parliament (2); and *semble*, shutting out a man's house from the view of passers by is not a legal injury; and *semble*, neither will the erection of a building be restrained merely because it injures the plaintiff by obstructing the view of his place of business (3).

62. Where a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in a specified manner, has permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant; and there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others; nor in the case where the breaches have been committed before the defendant became a purchaser and executed the deed of covenant (4).

Where material breaches permitted to be made by some purchasers, no injunction to restrain another purchaser.

63. Where A. had purchased a building plot of G., and had

(1) *Mitchell v. Steward*, L. R. 1 Eq. 541; 35 L. J. (Ch.) 393; 14 L. T. (N. S.) 134. *pany*, 14 W. R. 508; 15 W. R. 92; L. R. 2 Ch. 158.

(3) *Ib.*

(2) *Butt v. Imperial Gaslight Com-*

(4) *Peck v. Matthews*, L. R. 3 Eq. 515.

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covenanted to build on it a dwelling-house of the value of £250 at least, under the inspection and to the satisfaction of G.'s architect, in twelve months, and the twelve months having expired, A. proceeded to build a house of the required value, but, as to situation, contrary to the opinion of the architect, Vice-Chancellor Sir R. Malins held, that it was a breach of the covenant, and granted an injunction (1).

64. Where a purchaser covenanted with the vendors that the land conveyed, or the buildings to be erected thereon, should not be used as "a beerhouse, inn, or public-house for the sale of spirituous liquors," it was held by Vice-Chancellor Sir W. M. James, that the sale, under a license, of beer by retail, not to be drunk or consumed on the premises, was not a breach of the covenant (2).

Building a wall eight feet high not a breach (here) of covenant to build only dwelling-houses.

65. Where a piece of land was subject to a covenant entered into with the owner of the land on the opposite side of a street, that no buildings should be erected upon it except dwelling-houses of a certain minimum value, Vice-Chancellor Sir W. M. James held, that it was not a breach of this covenant to erect a wall 8 ft. 6 in. high round the borders of the land for the purpose of inclosing it as a garden, but that it was a breach to raise the wall to a greater height for the purpose of setting a vinery against it; and that it was a breach to set up a vinery resting against the wall, but the Vice-Chancellor refused a mandatory injunction and assessed the damages at 40s. (3); so a covenant to the effect that private houses only of a certain minimum value are to be built on certain plots of land, is not broken by the erection on one of them of a stable with a bedroom over it of such dimensions and in such a position that it would still be possible to build a house of the stipulated value upon the plot (4).

So (here) building a stable.

66. Where there was a covenant in a deed executed in the year 1854 not for the space of twenty years to use a house as a site for an hotel, tavern, public-house, or beerhouse, or to carry on there the trade or calling of an hotel or tavern keeper, publican or beer-shop keeper, or seller by retail of wine, beer, spirits, or spirituous

(1) *Goolden v. Anstee*, 18 L. T. 21 L. T. (N. S.) 352. (N. S.) 898.

(2) *London and North Western Railway Company v. Garnett*, L. R. 9 Eq. 18 W. R. 640; 39 L. J. (Ch.) 483; 22 L. T. (N. S.) 267.

26; 18 W. R. 246; 39 L. J. (Ch.) 25; (4) *Russell v. Baber*, 18 W. R. 1021.

liquors; it was held by Vice-Chancellor James, that the sale of wines and spirits in bottles by a grocer in the course of his trade, and not to be consumed on the premises, under the Wine Licenses and Refreshment Houses Act, 1860 (24 & 25 Vict. c. 21), was not such a breach of the covenant as a Court of Equity would interfere with (1).

67. Where a small plot of ground adjoining B.'s dwelling-house had been, in 1802, demised for building purposes to D. for three lives and thirty-one years, at a rent of £13 13s. per annum, and the lease contained a covenant that the tenement to be erected thereon adjoining B.'s house should be "built for a private family and no other, under a penalty of £10 a year additional rent, unless B. should convert his own house to any public use;" and two houses were accordingly built on the plot, one immediately adjoining B.'s house, and the other adjoining that; and in 1869 the defendant purchased the former of them from the assignees of D. at a public auction, and proceeded to convert it into a public-house—the second of the two houses had been used as a public-house for forty years without any objection on B.'s part, but B.'s own house had always remained a private dwelling-house; the Court held, that the £10 was in the nature of a penalty, and not of liquidated damages, and that there was nothing to establish acquiescence on the part of the plaintiffs (who had no power to prevent the second house being turned into a shop), and an injunction was decreed as prayed (2).

68. The Court will grant an injunction to restrain an act which is only impliedly forbidden; and where, on a sale of an estate as building land in 309 plots, each purchaser executed a covenant with trustees to observe certain conditions as to the user of the land; and the conditions stated that certain plots were reserved for two taverns; that "no houses other than detached or semi-detached," were to be erected, except upon the portion on which shops were permitted to be built; and that shops would be allowed to be built on sixty specified plots; a purchaser of one of the plots set apart for shops was restrained from building a public-house on it (3).

Act impliedly
forbidden will
be restrained.

(1) *Jones v. Bone*, L. R. 9 Eq. 674; 18 W. R. 489; 39 L. J. (Ch.) 405.

(2) *Bray v. Frogarty*, 18 W. R. 1152.

(3) *Hall v. Box*, 18 W. R. 820.

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69. Where a lease of a colliery contained an implied covenant on the part of the lessor to procure land for the lessees to make a railway to a neighbouring canal, without which they had no access to any available market, but the lessor did not procure the land, and the lessees being pressed for the rent, paid it, and proceeded then under the deed, and obtained an award in their favour, after which the lessor brought an action against the lessees for further rent, and the lessees applied to the Court for an injunction to restrain the action, for specific performance of the agreement to provide land, of the award, and rectification of the lease, and, the powers having expired, asked at the hearing for an inquiry as to damages; Lord Chancellor Hatherley held, varying the decision of Vice-Chancellor James, that the land being essential to the enjoyment of the property, and its provision the basis of the agreement, the documents did not properly carry out the intention, and the parties should as far as possible be replaced in their original positions, and therefore granted an injunction on the plaintiff's undertaking not to enforce the award; and a reservation of the plaintiff's right to proceed at Law for damages was struck out of the decree made in the Court below (1).

Lessee bound
to inquire, and
fixed with
notice of cove-
nants entered
into by lessor.

70. A lessee is bound to inquire into, and is fixed with notice of, all covenants into which his lessor has entered in respect of the land; and where, in 1854, a dwelling-house and shop were conveyed by the plaintiff to A. in fee, and the conveyance contained a covenant by A., his heirs, executors, and administrators, with the plaintiff, his heirs and assigns, that he and they would not use or occupy, or permit to be used or occupied, the building "as an inn, public-house, or tap-room, or for the sale of spirituous liquors, or ale or beer;" and in 1857 B. became tenant from year to year of the house, using and occupying it for the business of a grocer; and in 1862 A. demised the house and shop to B., the only restrictive covenant being a covenant by B. that "no offensive business or occupation, or nuisance, shall be carried on or committed on the said premises, and that the same shall be used as a dwelling-house and shop only;" and in 1866, B. began, in the course of his business as a grocer, to sell on the premises wine and spirits, but in bottle only, and B. had no knowledge of the covenant in the original

(1) *Davies v. Price, Acraman v. Price*, 18 W. R. 540.

deed ; it was held, by Vice-Chancellor James, that he was, notwithstanding, put upon inquiry, and was fixed with constructive notice of the covenant ; that the words, “for the sale of spirituous liquors,” did not prevent the sale of wine, but extended to the sale of spirituous liquors in bottle, and granted an injunction accordingly (1). The original grantor having filed a bill to restrain the lessee from breach of a restrictive covenant contained in the original grant, the original grantee was not a necessary party to suit (2), and the difference between this case and *Jones v. Bone* (3) is, that in this case the covenant was against the use of the house “for the sale of spirituous liquors,” in *Jones v. Bone* it is against using, exercising, or carrying on the business of a “seller” by retail of wine, beer, or spirituous liquors.

SECT. 15. *Nuisance.*

1. In *Attorney-General v. Sheffield Gas Consumers Company* (4) Lord Justice Turner said that he took the general principle on which this Court interferes in cases of this kind (nuisance) to be the inadequacy of the remedy which the law gives in such cases, and that the jurisdiction of this Court must rest on the ground of injury to property, and taking it to rest upon that ground, the only distinction which seemed to him to exist between cases of public nuisance and private nuisance was this—that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind. A bill in this Court to restrain nuisances extends to such only as are nuisances at Law, and the fears of mankind, though reasonable, will not create a nuisance ; therefore the Court, in *Baines v. Baker* (5), refused an injunction to restrain the building of an inoculation hospital, that not being considered as a nuisance. Where an owner of land abutting on a navigable river in Lower Canada, erected a wharf on his own domain, and B., a millowner on the

In nuisance, inadequacy of the remedy at Law is the principle of interference—the jurisdiction rests on injury to property, whether private or public property.

Only nuisances at Law restrained.

(1) *Feilden v. Slater*, L. R. 7 Eq. 523; 38 L. J. (Ch.) 379; 17 W. R. 485; 20 L. T. (N. S.) 112.

(2) *Ib.*

(3) Pl. 66, *ante*.

(4) 3 De G. M. & G. 304, 319; *Att.-Gen. v. Nichol*, 16 Ves. 338.

(5) Amb. 158.

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Actual
damage neces-
sary ;

or probability
of immediate
prospective
nuisance.

The Towns
Improvement
Act, 1847,
does not autho-
rize the com-
mittal of a
nuisance by
drainage of
towns into the
sea and public
rivers.

Temporary
nuisances
from a trade
not restrained.

Except where
irreparable or
substantial
damage, no
injunction—
unless done
under claim of
right.

opposite bank, brought an action against him, seeking the removal of the wharf, and for damages for the injury occasioned by preventing the free use of the waters of the river in working his mill ; it was held by the Privy Council, that not merely apprehended but actual damage (which B. failed to prove) must be established in order to sustain such action (1). The Court will not interfere *quia timet* in a case of merely prospective injury and alleged nuisance, but the actual existence of the nuisance must be proved (2). Therefore, where an information was filed at the relation of the conservators of the Thames to restrain the Corporation of Kingston-upon-Thames from the pollution of the Thames, a navigable river, by an increased discharge of sewage into it ; but the evidence failed to shew that a nuisance had actually arisen, or that there was a probability of immediate prospective nuisance, the Court dismissed the information, without prejudice to any future proceedings in the event of a nuisance being subsequently occasioned (3). The right of drainage into the sea and public rivers conferred by the Towns Improvement Clauses Act, 1847, is subject to the condition that no nuisance be created (4). And the 24th section of this statute (10 & 11 Vict. c. 34) does not authorize the creation of a nuisance by rendering the water unfit for human and animal use, in the drainage of towns into public rivers thereby directed (5). An order restraining persons from polluting a stream should restrain them from such a pollution as would be to the injury of the plaintiff (6). The Court will not interfere to prevent a nuisance caused by carrying on a trade which is temporary and occasional only, and in such a case the Court is not compelled to give damages, but may leave the plaintiff to his remedy at Law (7). And except in a case of irreparable damage or of substantial damage, or, perhaps, of continuous damage, a Court of Equity will not interfere by injunction unless the acts complained of are done under a claim of right (8). And in a suit between neighbouring manufacturers

(1) *Brown v. Guty*, 2 Moo. P. C. C. (N. S.) 341.

(2) *Att.-Gen. v. Kingston-upon-Thames (Mayor, &c.)* 11 Jur. (N.S.) 596.

(3) *Ib.*

(4) *Ib.*

(5) *Ib.*

(6) *Lingwood v. Stowmarket Paper-making Company*, 11 Jur. (N.S.) 993 ; 14 W. R. 78.

(7) *Swaine v. Great Northern Railway Company*, 10 Jur. (N. S.) 191.

(8) *Martin v. Douglas*, 16 W. R. 268, Ir. R.

to restrain the defendant from carrying on his manufactory in such a way as to injure the plaintiff's property by the emission of noxious gases, Vice-Chancellor Sir W. P. Wood held, that the defendant, whose manufactory was lawful in itself, but required the greatest caution to prevent the escape therefrom of injurious gases, would not be restrained from carrying on his manufactory, because occasionally, through the occurrence of accidents in the manufactory, the plaintiff was injured, and that the Court would only interfere where the injury was grave or frequent. And a party's right to have his property protected from injury cannot be affected by the fact that in his manufactory he uses a process of great delicacy (1).

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No interference unless injury grave or frequent.

2. If the injury sought to be restrained has been completed before the filing of the bill, and the plaintiff has in the first instance demanded, by an alternative prayer, an inquiry as to damages, the Court will not grant a mandatory injunction, even where the injury is substantial, but will direct an inquiry as to damages. And the noise and vibration occasioned by a steam-engine and circular-saw were considered an annoyance amounting to a nuisance, in respect of which an inquiry as to damages was granted (2).

If injury completed before bill, and bill prays, alternatively, damages, no mandatory injunction.

Noise and vibration of steam-engine and circular-saw, a nuisance.

3. A bill to restrain a nuisance is within the provisions of the 25 & 26 Vict. c. 42 (Rolt's Act), and the Court has no longer the power to require the plaintiff to establish his right at Law. But this does not affect the defendant's right to have the question of nuisance or no nuisance decided by a jury; but, *per* Vice-Chancellor Sir W. P. Wood, "Where the Court finds any real apprehension of serious and immediate injury to health, or of any pressing character of the like nature (such as the cases of stench or of apprehended inundation), the Court will interfere to prevent such irreparable injury in the meantime" (3); *semble*, the Court will not ordinarily try a question of nuisance before itself, unless the acts complained of have been done in London or Middlesex, but will direct an issue (4).

The Court cannot now require plaintiff to establish his right at Law.

(1) *Cooke v. Forbes*, 37 L. J. (Ch.) 178; 17 L. T. (N. S.) 371.

(2) *Gort (Viscountess) v. Clark*, 16 W. R. 569; 18 L. T. (N. S.) 343.

(3) *Eaden v. Firth*, 1 H & M. 573; *v. Swaine v. Great Northern Railway Company*, 33 L. J. (Ch.) 399.

(4) *Ib.*

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Court will not relieve where party has had ample opportunity of trying his right at Law, and no action brought.

Acquiescence precludes right to relief.

Tenant from year to year may restrain interference with light and air.

But the extent of the interest is a material ingredient.

Mandatory injunction refused on ground of balance of inconvenience.

4. The Court, in exercising the increased powers conferred on it by modern legislation in respect of legal rights, will have regard to the principles upon which it formerly acted, and will not, therefore, entertain a suit where a party has had ample opportunity of trying his right at Law and no action has been brought (1); and where a party had lain by, and allowed expenditure to be incurred, and a trade, which might be a nuisance in point of law, to be established, and carried on for a considerable period without asking for the interference of the Court, or bringing an action; the Court held, that he was precluded by acquiescence from obtaining relief in Equity, though the trade had been gradually increasing (2).

5. Where a tenant from year to year filed a bill against adjoining tenants holding under the same landlord, to restrain the erection of new buildings, interfering with the free access of light and air to the premises occupied by him, and the landlord thereupon gave the tenant notice to quit, and at the time of the hearing only eight months of the tenancy were unexpired, it was held by the Master of the Rolls, Sir John Romilly, that the slender extent of the plaintiff's interest constituted no sufficient reason for denying him the protection of the Court; and the plaintiff having remonstrated with the defendants previously to the erection of the new buildings constituting the nuisance, a mandatory injunction was awarded by the Master of the Rolls, compelling the defendants to pull them down; but, on appeal, the Lords Justices held, that though the extent of the plaintiff's interest did not necessarily disentitle him to relief, yet it was a material ingredient for consideration; and it was not clear in this case that the plaintiff had sustained material injury, and as the inconvenience to the defendants of compelling them to pull down their buildings would be far greater than any which the plaintiff could endure if the buildings were allowed to stand, and he were left to bring an action for damages, the bill ought to be dismissed without costs, without prejudice to any action the plaintiff might be advised to bring (3).

6. Where commissioners proposed turning an inclined road or

(1) *Swaine v. Great Northern Railway Company*, 9 Jur. (N. S.) 1196.

(2) *Ib.*

(3) *Jacomb v. Knight*, 9 Jur. (N. S.) 529; 32 L. J. (Ch.) 601.

ship-way leading from a town to the sea-shore from the north-east to the north-west, and this, so far from producing any injury would make a more convenient landing-place, the Court decided that, whether they were authorized or not, it would not interfere in the matter (1).

7. Although a very strong case of nuisance (in this case smell, &c., from petroleum works) may be established by the affidavits in support of an interlocutory motion to restrain the noxious manufactory, the Court said it considers it a very strong course to stop the carrying on a trade by interlocutory injunction; and reserved the question until the hearing of the cause, which was advanced for that purpose (2).

The Court considers it a strong course to stop carrying on a trade by interlocutory motion.

8. Where a nuisance is only temporary the Court will hesitate to grant a mandatory injunction on an interlocutory application before the hearing (3).

If nuisance temporary, Court hesitates to grant a mandatory injunction on interlocutory application.

9. The right of prosecution given to the Home Secretary by 21 & 22 Vict. c. 104, s. 31 (altering and amending the Metropolitan Local Management Act, 1855), does not supersede the right of private persons aggrieved by the nuisance to an injunction (4).

10. The Court has power to interfere with a public body in the exercise of powers conferred by Act of Parliament, where the exercise is not *bonâ fide*, but where powers are so conferred the Court will not assume that the exercise of them will create a nuisance; however, where the Court of Appeal was satisfied upon the evidence that the intended convenience, namely, a urinal, would not of necessity be a public nuisance, and also that it was neither certain nor probable that the vestry, the defendants, were exceeding nor would exceed their statutory powers, and that the vestry were not influenced by any improper motive, it dissolved an interlocutory injunction granted by the Vice-Chancellor Sir J. Stuart. In this case a vestry, acting under the powers of sect. 88 of 18 & 19 Vict. c. 120 (the Metropolitan Local Management Act, 1855), resolved to erect a urinal in a situation where the vestry deemed such accommodation was required by the public; but where B., residing nearly

Court has power to interfere with public bodies exercising powers conferred by Acts if not exercised *bonâ fide*.

(1) *Ryde Commissioners v. Isle of Wight Ferry Company*, 30 Beav. 616.

(2) *Att.-Gen. v. Charles*, 11 W. R. 253.

(3) *Att.-Gen. v. Metropolitan Board of Works*, 9 L. T. (N. S.) 139.

(4) *Att.-Gen. v. Metropolitan Board of Works*, 1 H. & M. 298.

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Burning
bricks offen-
sively to a
neighbour
will be re-
strained.

opposite the proposed site of the urinal, and other occupiers of houses considered that it would be a private nuisance, and the Vice-Chancellor granted an injunction until the hearing of the cause, restraining the vestry from proceeding to make the erection complained of, on the grounds that the Act conferred no power to enable the vestry to erect that which would be a nuisance to any one; and that the vestry had no power to suppress nuisances; and that the Act conferred no arbitrary power, which appeared to have been exercised, on the metropolitan vestries (1).

11. Burning bricks on a man's own ground so as to be offensive to a neighbour, is a nuisance, and will be restrained by injunction. In this case a landholder had built a house, and laid out grounds, shrubberies, and gardens adjacent thereto before 1829, and let the same to a tenant, and the house was continuously occupied as a dwelling-house from that time down to 1851; and early in 1850 the owner of adjoining land began to manufacture bricks of the clay or earth of the same land, by burning in a clamp, which was erected within 144 feet of the dwelling-house, and within fifteen feet of the stable; and a bill was filed by the landowner and his tenant, praying an injunction to restrain the neighbouring landowner from proceeding with the manufacture of the bricks; the Court held, that the brickmaking was a private nuisance, and (as the parties on both sides requested the Court not to send a case for the opinion of, or an action to be tried by, a Court of Law), that an injunction must be granted to restrain the defendant from burning bricks on his ground so as to occasion damage or annoyance to the plaintiffs, or either of them, as owner or occupier of the house and grounds, until further order (2).

12. Where a party in the exercise of private rights over his own property, on a portion of his own land, does acts which interfere with his neighbour's right to the enjoyment of pure air, and cause injury to the neighbour's property, and there are other situations on his land where he might do the same acts with equal or nearly equal benefit to himself, and without any or with considerably less inconvenience to his neighbour, the Court will

(1) *Biddulph v. St. George's, Hanover Square (Vestry)*, 33 L. J. (Ch.) 411; 9 Jur. (N. S.) 434, 953; 11 W. R. 524, 739; 8 L. T. (N. S.) 44, 558.
(2) *Walter v. Selfe*, 4 De G. & Sm. 315; 15 Jur. 416.

interfere by injunction; and the Court refused to direct an action to try the question of whether the acts complained of amounted to a legal nuisance or not, being satisfied of the facts, both of the defendant having other available lands at his disposal, and of the plaintiff having sustained an injury. In this case the defendant had contracted with government to supply a large quantity of bricks for the erection of the fortifications at Portsdown Hill, and had obtained a lease of land, containing brick clay, upon which he erected brick-kilns within 340 yards of the plaintiff's mansion, and close to the boundary of her property; and he proceeded with the burning of bricks, which was an annoyance to her and a destruction to her property, by interfering with her comfort and enjoyment of the mansion, and injuring or destroying the trees planted and standing for ornament, and for the purpose of excluding the view of unsightly objects from the mansion; and Vice-Chancellor Sir J. Stuart granted an injunction to restrain the nuisance, there being nothing to shew that the defendant might not have burnt the bricks elsewhere so as not to be a nuisance, and directed that the defendant should not burn any bricks within a distance of 653 yards from the house (1).

13. Where there is some convenience afforded to the public, the Conservators of the Thames have, subject to the sanction of the Board of Admiralty, such a right to erect piers or landing-places, at such points and in such manner as they think fit, that their discretion is conclusive on the question of nuisance to the navigation, and the Court cannot restrain them upon any ground arising out of the balance of convenience and inconvenience; and under the Thames Conservancy Act, 1857 (20 & 21 Vict. c. 147), the Conservators of the Thames being empowered to erect piers at any convenient place, of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation, the plans to be first approved by the Admiralty; Vice-Chancellor Sir W. P. Wood held, that the Court had no jurisdiction to interfere by injunction at the suit of the Attorney-General, on the ground of the alleged inconvenience of proposed piers, or, at most, that it could only interfere where it was shewn

(1) *Beardmore v. Tredwell*, 3 Giff. 683; 9 Jur. (N. S.) 272; 7 L. T. (N. S.) 207; 31 L. J. (Ch.) 892.

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that the piers would be entirely useless (1). The Statute also directed that, whenever the conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the Watermen's Company, they should erect equally convenient stairs or landing-places in substitution for them; and the Vice-Chancellor also held, that the substitution of new stairs or landing-places was not a condition precedent, but a condition subsequent to the removal or disturbance, and that where the conservators had prepared plans for piers which would interfere with such old stairs, without shewing any adequate provision in substitution for them, the Court would not assume that the duty would be neglected, and would not interfere at the suit of the Attorney-General to restrain the works until proper substitutes should be provided for the old stairs, and that the remedy, if afterwards the conservators did not erect other stairs equally convenient, was by mandamus. The Statute (2) contained (in sect. 179) a saving of all rights to which any owners or occupiers of any land on the banks of the river, including the banks thereof, were by law entitled; and the Vice-Chancellor held that the right of access to a wharf was a private right within this saving, and that the Court would restrain the conservators from depriving any person having a right of access to the river from his own land; but that a pier which rendered the approach to a wharf less convenient without rendering access impossible, was an interference, not with the private right of access, but with the public right of navigation enjoyed by the wharfowner in common with the rest of the public, and that such right was not among those comprised in the statutory saving; and the information and bill, instituted to restrain the erection of piers by the conservators, and from obstructing the use of public stairs and impeding access of vessels to the plaintiffs' wharves, and the other suits, in respect of injury to the private rights of the plaintiffs, were dismissed, but without costs, on the ground that the questions raised were of great nicety and might reasonably be brought before the Court, and that the rights

(1) *Att.-Gen. v. Conservators of River Thames, City of London Brewery Company v. Same, Thornton v. Same*, 1 H. & M. 1; 8 Jur. (N. S.) 1203; 11 W. Company v. Same, Clothworkers' Com- R. 163.

(2) *Supra*.

claimed by the defendants were extreme, and that there could be no doubt that the property of the plaintiffs would be seriously injured (1).

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14. A party is entitled to an injunction to restrain pollution of water passing by his property, though it be done by direction of a local board of health. In this case the sewage of a town had, by such direction been, by means of drainage, conveyed to a river; this sewage, not having been completely deodorized before coming in contact with the river, had so polluted the stream passing the plaintiff's property as to kill the fish therein, and otherwise cause a nuisance; Vice-Chancellor Sir W. P. Wood granted the plaintiff an injunction (2).

15. It is no answer to an information at the relation of a local board of health to abate a nuisance arising from sewage, that the board has power itself to remedy the evil by making sewers; because it is the duty of the board to prevent a nuisance arising in its district, instead of putting the ratepayers to the expense of additional works. If a public body which has power given it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute. Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the Court to inquire in what way the defendant can best remove it, and the plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to. In such a case, a reference before the decree to an expert, under the 15 & 16 Vict. c. 86, s. 43, as to the existence of the injury, or as to the best mode of removing it, is improper, notwithstanding *Yates v. Jack* (3) and an unreported case of *Heath v. Wallingford*; but when the difficulty of removing the injury is great, the Court will suspend the operation of the injunction for a

No answer that a local board plaintiff can itself provide a remedy for a nuisance from sewage.

A public body is, in the exercise of its statutory powers, responsible for injury to property—unless the act be absolutely necessary for the object.

Defendant must find his own way to remove the nuisance, &c.

(1) *Att.-Gen. v. Conservators of River Thames, City of London Brewery* & M. 1; 8 Jur. (N. S.) 1203; 11 W. R. 163.

(2) *Bidder v. Croydon Local Board of Health*, 6 L. T. (N. S.) 778.

(3) *L. R. 1 Ch. 295.*

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time, with liberty to the defendants to apply for an extension of time; and where an information was filed at the relation of a local board of health, praying for an injunction to restrain the visiting justices of a county lunatic asylum from allowing the sewage from the asylum to pollute a certain stream—the facts of the pollution of the stream existing, and of being attributable in part to the sewage of the asylum, being proved—the Court of Appeal, varying an order made at the hearing by Vice-Chancellor Sir R. Malins, granted an injunction, but suspended its operation for three months to enable the defendants to make the necessary arrangements, with liberty to the defendants to apply for an extension of time (1). The Lunatic Asylums Act, 1845 (8 & 9 Vict. c. 126) does not, by requiring the justices to build lunatic asylums, impliedly authorize them to allow the sewage from the asylums to create a nuisance (2).

16. In *Attorney-General v. The United Kingdom Electric Telegraph Company* (3) the Master of the Rolls refused to grant an injunction to restrain acts which were alleged to be a public nuisance, and also injurious to the private rights of a private person, until the question of nuisance and injury had been first determined at Law, on the ground that under the circumstances a jury was the best tribunal for the trial, both of the public and private nuisance. In this case a telegraph company, without any parliamentary powers, had laid down their wires in tubes under a public highway, and an information and bill were filed complaining of this and other acts as a nuisance to the public and as an invasion of the rights of the owner of the adjacent land in the soil of the road; and the Court, grounding its determination on the considerations that the question, what is a nuisance, is one peculiarly fitted for the investigation of a jury, and that in an ordinary case, where the issue of a suit in Equity depends upon a legal right, that right must be ascertained in an action before any relief can be granted by a Court of Equity; directed that the questions of nuisance and trespass should be tried at Law, but retained the bill until after such trial.

(1) *Att.-Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; 38 L. J. (Ch.) 265; 17 W. R. 240; 19 L. T. (N. S.) 708.

(2) *Ib.*

(3) 31 L. J. (Ch.) 329; 30 Beav. 287; 5 L. T. (N. S.) 338.

17. Where a railway company being in the use and occupation of a railway bridge over a highway, and being owners of the soil on either side of the road, commenced the construction of buttresses in the road, on a line with the existing abutments, for the purpose of widening their bridge, and the plaintiffs, in whom the soil of the road was vested under the Metropolitan Management Act, as surveyors of the highways, filed a bill to restrain the company from further narrowing the road on the ground of public inconvenience; the Court refused the injunction on the ground that the inconvenience was not of sufficient magnitude for the interference of the Court; and held further, that as the soil was vested in the board for the convenience of the public, the Court would not interfere by injunction, as the inconvenience to the public passing along the lane would be none, or very small (1).

No injunction where inconvenience small.

18. Where an owner of houses who lives at a distance from them applies for an injunction, on the ground of nuisance to the inhabitants of such houses, the Court will not interfere by an interim injunction where there is no evidence of such inhabitants in support of the applicant; nor will the Court, where it has good ground for concluding that a present nuisance is temporary, grant an interim injunction in order that the plaintiff may bring an action which may be nugatory (2).

No interim injunction if good ground for concluding nuisance is temporary.

19. Where a covenant not to create a nuisance applies to allottees *inter se*, a nuisance on adjoining land not part of the allotment is not a fraud on the covenant (3).

20. The question whether brick-burning is a nuisance in the sense of being an annoyance must depend on the circumstances, and no distance can be fixed (4).

21. In *Haines v. Taylor* (5) the Court refused an injunction to restrain the erection of gas-works in the vicinity of the plaintiff's residence, it being uncertain whether upon the completion of the works, the manufacture of gas would prove a nuisance. Where a work is going on, which though not in itself a nuisance will manifestly end in operations presenting such a nuisance as this Court

No injunction to restrain contingent nuisance.

(1) *Wandsworth Board of Works v. London and South Western Railway Company*, 31 L. J. (Ch.) 854; 8 Jur. (N. S.) 691.

(2) *Cleeve v. Mahany*, 9 W. R. 882.

(3) *Ib.*

(4) *Ib.*

(5) 2 Ph. 209; 10 Beav. 75.

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restrains, this Court will interfere at once; but in this case the motion, being for an injunction to restrain a contingent nuisance, was refused, and the Lord Chancellor held, that the motion ought to be refused with costs, and not stand over.

22. In *Dewhirst v. Wrigley* (1) it is ruled that where the Court interposes by injunction to prevent a nuisance it ought to make provisions for having the question between the parties (then) tried at Law; and, pending proceedings at Law to try the right of the plaintiff to the use of water, as he claims it, by a watercourse, Equity will restrain the defendants from obstructing such watercourse; but that proper provisions should be made for having the question (at that time) tried at Law.

23. Where the plaintiff, a market gardener, occupying, under a renewed lease, expiring in 1874, lands adjoining the works of a gas company, brought an action, by direction of the Court of Chancery, to recover damages for an injury done to his crops by the noxious matter issuing from the company's works, occasioned by the erection of gas-works much larger, and nearer the plaintiff's premises, than their former works, and the action was referred to arbitration, and nearly two years elapsed before the award was made, in the course of which time alterations in the mode of carrying on the business complained of were effected by again enlarging the works, and two months after the date of the award an injunction was applied for; the House of Lords—affirming the decision of Lord Chancellor Cranworth (who had affirmed the decision of Vice-Chancellor Sir W. P. Wood)—held, that there had not been any such acquiescence or laches as to deprive the plaintiff of his right to the injunction; and the Lord Chancellor, in the Court below, and the House of Lords, being satisfied with the award, holding it to be equivalent to a verdict of a jury, declined sending the case again to Law, although the ordinary rule was (then) not to grant an injunction to restrain a nuisance until the existence of the nuisance had been established by the verdict of a jury (2). Vice-Chancellor Sir W. P. Wood granted a perpetual injunction

(1) *Coop. C. P.* 319.

(2) *Imperial Gaslight and Coke Company v. Broadbent*, 7 H. L. C. 600; 7 De G. M. & G. 436; 5 Jur. (N. S.)

1319; *Broadbent v. Imperial Gaslight and Coke Company*, 3 L. J. (N. S.) 221; 2 L. J. (N. S.) 1132.

restraining the company from manufacturing gas so as to injure plaintiff's crops, and the Vice-Chancellor held, that where there is no suspicion of rivalry in trade being the motive, the Court shews a disposition less carefully to balance the comparative inconvenience caused to the contending parties by granting or withholding the injunction, and to consider more the absolute wrongdoing; and as to motives of public policy alleged to be involved by an injunction which would render the due lighting of the streets and public buildings impossible, these were not allowed to be brought forward by a wrongdoer to maintain him in his wrong; nor was any weight allowed to the circumstance that the plaintiff only alleged a case of pecuniary damage, which admitted, therefore, of a complete pecuniary compensation, without having recourse to the extraordinary relief by way of injunction (1).

Motives of public policy as to rendering the due lighting of streets impossible, not allowed to be brought forward by wrongdoer.—No weight allowed to the circumstance that only a case of pecuniary damage was alleged.

24. If a plaintiff applied for an injunction in respect of a violation of a common law right, and the existence of that right, or the fact of its violation, was denied, he was obliged to establish his right at Law; but having done that, he was, except under special circumstances, entitled to an injunction to prevent a recurrence of that violation, and for such a purpose the award of an arbitrator was equivalent to a verdict; and if, between the time of the case being referred and the award being made, there had been an alteration in the mode of carrying on the business complained of, it might, if in diminution of the cause of injury, be shewn as an answer to the application for an injunction; but if in increase of the cause of injury, as was the case here, it needed not be the subject of a fresh proceeding at Law; that was matter for the discretion of the Court of Equity, and although a *bonâ fide* alteration might have been made with the object of abating the nuisance the party was not bound to proceed at Law to ascertain the fact (2).

25. Though A. may be disentitled by acquiescence to an injunction to stop B.'s manufactory, which is noxious to the neighbourhood, yet it does not consequently follow that B. is entitled to an injunction to prevent A.'s recovering damages at Law, and Equity may

Acquiescence in erection of works not injurious, creates no implied acquiescence

(1) *Imperial Gaslight and Coke Company v. Broadbent*, 7 H. L. C. 600; 7 De G. M. & G. 436; 5 Jur. (N. S.) 221; 2 L. J. (N. S.) 1132. 1819; *Broadbent v. Imperial Gaslight and Coke Company*, 3 L. J. (N. S.)

(2) *Ib.*

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in the extension of those works, and Court will not restrain action for damages.

Acquiescence in noxious works while producing little injury, does not warrant an extension productive of great damage.

Delay (here) disentitled to relief.

Where nuisance causes substantial and permanent damage to an individual, Court grants injunction though the act causing the nuisance is beneficial to the public.

leave both parties to their legal rights; and though an occupier of lands acquiesces in the erection of works on adjoining land, which appear not to be, and are not, in fact, injurious, there is no implied acquiescence in the natural extension of those works in the ordinary course of operations; and the Court will not restrain the party aggrieved from proceeding at Law to obtain compensation by damages for the injury sustained (1); and acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage (2); and in this case the Court refused an injunction to prevent, on the alleged ground of acquiescence, a party injured by copper-works from enforcing a judgment recovered by him for damages at Law, with costs (3).

26. Where a road had been altered in 1855 in a manner which the plaintiff considered likely to retard the escape of water in time of flood, and thus to aggravate the mischief done by floods to his property, and especially to do him serious damage on the occurrence of great floods, such as might be expected every twenty or thirty years, and while the works were in progress in February, 1855, he threatened proceedings to stop them, and in 1857 a great flood occurred, shortly after which, in December 1857, he filed a bill to have the road restored to its condition before 1855, and to have compensation for the damages done by the flood of 1857; the Court held, that the fact of no serious damage being done in the interval did not excuse the delay, and that he was not entitled to have the bill retained pending a trial, but dismissed the bill with costs, without prejudice to any proceedings at Law (4).

27. Although the Court of Chancery will sometimes refuse an injunction to restrain a nuisance, as, for instance, where the damage is infinitesimally small, and the continuance of the nuisance of short duration; yet where the nuisance causes substantial and permanent damage to an individual, the Court will not refuse an injunction, even though the act causing the nuisance may in its results be beneficial to the public (5).

(1) *Bankart v. Houghton*, 27 Beav. 425; 5 Jur. (N. S.) 282; 28 L. J. (Ch.) 473; 7 W. R. 197; 32 L. T. 382.

(2) 1b.

(3) 1b.

(4) *Wicks v. Hunt*, 1 Joh. 372.

(5) *Broadbent v. Imperial Gas Company*, 3 Jur. (N. S.) 221; 26 L. J. (Ch.) 276.

28. In *Pollock v. Lester* (1) an injunction was granted before trial at Law, to restrain the burning of bricks, not then already burning, in clamps on ground within sixty yards of the plaintiffs' houses, and from continuing, after a certain day, to burn such as were then burning, upon evidence of ill consequences suffered by some of the plaintiffs and their families from the noxious effects of the operation; the plaintiffs undertaking to proceed with the action at the assizes about to take place, and to abide any order the Court might make as to damages to the defendant (2).

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Burning of bricks restrained before trial at Law upon evidence of ill consequences to plaintiffs therefrom.

29. In *Attorney-General v. Sheffield Gas Consumers Company* (3) the disturbance of the pavement in a town by an unincorporated gas company for the purpose of laying down gas-pipes was held by the Lord Chancellor and Lord Justice Turner (*dissentiente* Lord Justice Knight Bruce) not to be such a nuisance as to be a sufficient ground for an injunction, either upon a bill or upon an information. In this case a gas company was incorporated by Act of Parliament for the purpose of supplying the town of S. with gas. Some years afterwards another company was formed, and, in 1852, registered under the Joint Stock Companies Registration Act, for a like purpose, and commenced opening up the streets and highways of S. to lay down their pipes, &c., some of the inhabitants approving and some disapproving of the works; and, upon an information and bill by the incorporated company, the Court (Lord Justice Knight Bruce *dissentiente*) refused an injunction to restrain the new company from continuing their works, the nuisance or damage being trivial. And in *Attorney-General v. Cambridge Consumers Gas Company* (4) Lords Justices Wood and Selwyn held (reversing the decision of Vice-Chancellor Sir R. Malins), that the disturbance of the pavement of a town by an unincorporated gas company, without lawful authority, for the purpose of laying down gas-pipes, is not a nuisance so serious and important, or so continuous an injury, that a Court of Equity will interfere by injunction to prevent it, and the views of the governing body of a town, and the motives of the persons instituting a suit, are not immaterial where the complaint is of a public injury.

The disturbance of the pavement in a town to lay down gas-pipes not such a nuisance as sufficient for an injunction.

(1) 11 Hare, 266.

(4) L. R. 4 Ch. 71; 38 L. J. (Ch.)

(2) *Ib.*

94; 17 W. R. 145; 19 L. T. (N. S.)

(3) 3 De G. M. & G. 304; 17 Jur. 508.

677; 22 L. J. (Ch.) 811.

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Time is an ingredient and laches a defence, both on information and bill.

30. Time is an ingredient which is to be considered in determining a question of injunction, although the application be on behalf of the Attorney-General, and laches may be a defence to an application for an injunction by way of information as well as upon a bill (1).

31. Although the motives with which a suit is instituted are not generally to be regarded, they are not wholly immaterial when the complaint is of an alleged public injury; and the views of the majority of the inhabitants of a town, and of their governing body, are not without weight on such questions (2).

32. It is not enough to shew a nuisance to constitute a case for an injunction; but if it is a continuing nuisance, the Court will not refuse an injunction because the actual damage arising from it is slight (3).

No injunction till the right established, if nuisance is not irremediable and capable of compensation.

33. Where a bill was filed by a married woman, by her next friend (her husband and others being defendants), in respect of her separate property, alleging a nuisance by reason of a noisy trade, which destroyed her rest, and depreciated the value of her property, but the evidence as to the nuisance was conflicting, and no action had been brought; Vice-Chancellor Sir R. T. Kindersley held, that the nuisance, if there was one, was not irremediable, but capable of compensation by damages, and that there could be no injunction till the right was established at Law (4), though, had the nuisance been irremediable, and not capable of compensation, this Court might impose terms, pending the trial of the question of nuisance, to protect the property in its existing state. The Vice-Chancellor said that he felt so much doubt, also, whether the plaintiff could maintain the suit at all, that he should feel great difficulty on that ground alone, his difficulty being whether the plaintiff could sue alone, or by her next friend, in respect to a personal nuisance to herself and her husband; and that as to mere depreciation of value in property, that was not a ground of proceeding as for a nuisance (5).

34. Where a plaintiff, a single parishioner, filed a bill against some of the churchwardens of his parish, and complained of works

(1) *Att.-Gen. v. Sheffield Gas Consumers Company*, 3 De G. M. & G. 304.

(2) *Ib.*

(3) *Ib.*

(4) *White v. Cohen*, 1 Drew. 312.

(5) *Ib.*

intended to be executed by them for warming the church, which, he alleged, in the way in which it was proposed to execute them, would be injurious to health, and would constitute a nuisance; but the plaintiff did not allege any right of property in a particular pew, but he alleged that he was a parishioner, and that he was in the habit of attending divine service in the parish church; Lord Cranworth was very doubtful whether such a bill could be sustained by a single individual. In this case much negotiation had taken place, in the course of which the defendants had shewed a continued acquiescence in the suggestions made by the plaintiff as to the mode of executing the works, and had suspended their execution; and while these negotiations were still going on, and before any works were commenced, the plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion on the day following the service of the notice of motion; and the defendants, in order to avoid litigation, passed a resolution at a vestry, at which the plaintiff was present, that the works should be wholly abandoned, and after that the plaintiff brought on his motion; the Court held, without going into the question whether there would be any nuisance, that, under the circumstances, the motion was useless and improper, and it was refused with costs (1).

Useless and improper motion refused with costs.

35. In *Soltau v. De Held* (2) Vice-Chancellor Kindersley granted an injunction, after a trial at Law, to restrain the ringing the bells of a Roman Catholic church so as to occasion any nuisance, disturbance, and annoyance to the plaintiff, who resided near the church. In this case the plaintiff, in the year 1817, became the lessee of a dwelling-house which formerly constituted part of a large mansion, the other part of which was also occupied as a dwelling-house till the year 1848, when it was purchased on behalf of a Roman Catholic community, who converted the lower rooms into a chapel, and erected a bell at the top, which bell was rung at various times every day, commencing at 5 in the morning. Subsequently, a chapel, capable of containing 400 persons, was built in the front of the house so adjoining to the plaintiff's house, and a belfry was erected, containing six large-sized bells. These bells were also rung very frequently. The plaintiff brought an action against the

Ringling of bells so as to occasion nuisance restrained.

(1) *Woodman v. Robinson*, 2 Sim. (N. S.) 204. (2) 2 Sim. (N. S.) 133.

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A bill may be filed by an individual for a private nuisance although it may also be a public nuisance.

defendant, who was priest of this Catholic chapel, on the ground that the bells were a nuisance, and recovered 40s. damages. The bells were only rung afterwards on Sundays for five periods of five minutes each. The plaintiff filed his bill for an injunction to restrain the ringing; and the Vice-Chancellor held, upon a demurrer for want of equity, that a bill might be filed by an individual, alleging a private nuisance, although the nuisance might at the same time be public. And where a plaintiff suffers a particular injury from the obstruction of a public way, a bill for an injunction in Equity will lie, and the Attorney-General need not be a party (1).

36. A Court of Equity would not exercise its jurisdiction by injunction, at the instance of an individual, against an alleged nuisance, without a previous trial at Law, or without its being clearly proved that the plaintiff had sustained such substantial injury as would have entitled him to a verdict for damages in an action at law (2).

Where evidence conflicting and inspection impracticable, interlocutory injunction refused.

37. Where a motion was made for an injunction to restrain the defendants from proceeding with a shaft and other works, by which the plaintiff was apprehensive that his brine-pit and apparatus for the manufacture of salt would be irremediably injured, and the evidence of the plaintiff and that of the defendants was altogether conflicting, and an inspection of the defendants' shaft was impracticable in consequence of its being filled with brine, the Court refused an interlocutory injunction, and directed that the costs of the defendants should be costs in the cause, but that the question, whether the plaintiff's costs ought to be costs in the cause, should stand over till the hearing (3).

Neither lessor nor one of two lessees can alter that one lessee's premises to prevent comfortable enjoyment of other lessee's premises.

38. Where A., being the owner of two adjoining houses, demised one to B., and afterwards demised the other to C., neither A. nor C. can make such alterations on the premises demised to the latter as will prevent the comfortable enjoyment of the house demised to B.; and if C. threatens and begins to make alterations which the Court is satisfied will prevent the comfortable enjoyment of B.'s house, an injunction will be granted (4).

(1) *Cook v. Bath (Mayor, &c.)* L. R. 6 Eq. 177; 18 L. T. 123.

(2) *Elmhirst v. Spencer*, 2 Mac. & G. 45.

(3) *M'Curdy v. Noak*, 17 L. J. (N. S.) Ch. 165.

(4) *Palmer v. Paul*, 2 L. J. (Ch.) 154.

39. Where certain individuals suffer an injury from a public nuisance quite distinct from that done to the public at large, the Court will entertain a bill filed by those individuals to be relieved from the nuisance; so held on demurrer to a bill which was filed by the lessee and yearly tenant (coach-master and livery stable keeper) of a coach-house and stable in Granby Mews to restrain a company from cutting through and stopping up a horse and carriage road leading from the mews, through Granby Street, to the Hampstead Road (1). And a party sustaining special damage from a nuisance may sustain a bill to restrain it without making the Attorney-General a party (2).

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Individuals suffering injury from public nuisance distinct from that done to public, relieved from the nuisance.

40. In *Attorney-General v. Forbes* (3) the Court granted an injunction on an information and bill, upon the ground of public nuisance, to restrain the magistrates of a county from cutting the timbers supporting the roadway of a bridge, which timbers and roadway, at the place proposed to be cut, were within their jurisdiction, but of which the other extremity was within the jurisdiction of a different county.

Magistrates restrained cutting timbers supporting roadway of bridge.

41. Where an Act of Parliament empowered the Commissioners of Woods and Forests to make certain new streets, according to a particular plan therein referred to, and to lease and enter into agreement for leasing the grounds in the lines of the new streets, and under this power leases were granted of two plots of ground, upon which the lessees erected two particular houses, in the line of one of the new streets, and each of the leases described the plot of ground which was demised as being "on the north side of a new street then forming there, called," &c., "and as fronting towards the south on the said new street," and the plan referred to in the Act of Parliament exhibited an open space in front of the sites of these houses; but that plan was not mentioned in either of the leases, and the intended streets were completed, and the space in front of the houses was left open, and the Commissioners of Woods and Forests, and the paving committee of the parish, afterwards gave permission to certain persons to erect an equestrian statue of King George III. in the open space, and those persons proceeded to place it upon a part of that open space, but

Erection of statue (here) not justify interference of Court.

(1) *Spencer v. London and Birmingham Railway Company*, 8 Sim. 193.

(2) *Sampson v. Smith*, 8 Sim. 272.

(3) 2 My. & Cr. 123.

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without interfering with the line of the carriage-way of the new street in which the houses stood, and the lessees of the houses thereupon filed a bill to restrain the erection of the statue; alleging that upon the treaty for the leases the lessees were shewn the plan of the intended new street, and parts adjacent, by which it appeared that the space in question was to be quite open and free from all obstruction, and that it was upon the treaty represented and stated, that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue, and they also alleged that the proposed erection would diminish the value of their property, and be a public and a private nuisance; the Court held, that the injury and inconvenience, if any, did not constitute such a description of private nuisance as would justify the interference of the Court, and said if the plaintiffs conceived themselves aggrieved, "all the other remedies of the law were open to them" (1).

Injunction refused where uncertain whether mischief will happen from the intended erection of an engine for draining—unless the change of machinery be extravagant.

42. In *Ripon (Earl of) v. Hobart* (2), the Court refused an injunction, at the instance of parliamentary commissioners for cleansing and improving the river Witham and its navigation and the drainage of the adjacent lands, against the erection or use of a steam-engine, by parliamentary trustees, for draining a particular district, the injunction being applied for on the ground of probable damage to the banks of the river, into which an increased body of water was thereby expected to be thrown, and also on the ground of apprehended injury to the drainage of the lands within the jurisdiction of the commissioners; the Lord Chancellor (Lord Brougham) observing, that "in the present case, till the event happened, no man could take upon himself to say with confidence, upon such evidence as was there brought forward, whether or not mischief would happen from any given change of machinery, so long at least as that change does not go to a length so great as to be extravagant, and to which no one supposes the defendants could think of proceeding."

Where danger of irreparable injury to property, Court

43. The Court has jurisdiction by injunction on danger of irreparable injury to property, though as a public nuisance an object of prosecution by the Attorney-General, the subject in this case

(1) *Squire v. Campbell*, 1 My. & Cr. 459.

(2) 3 My. & K. 169; Coop. temp. Brough. 333.

being a corning-house to powder-mills, from site, construction, &c., eminently dangerous to the neighbourhood and public. The plaintiffs were directed to indict the building as a nuisance, with an arrangement for a speedy trial, and the concern to be put in such circumstances that it might be carried on without imminent danger in the interval (1).

44. The jurisdiction by injunction, where the effect will be to stop a great trading concern, is exercised with caution, and not *ex parte*, but on notice (2).

45. In *Attorney-General v. Cleaver* (3) it was laid down that the jurisdiction of the Court by injunction on information by the Attorney-General at the relation of individuals against a nuisance by an offensive and an unwholesome process in trade, was not exercised without a trial at Law, regulating according to justice the time of the trial of an indictment in this case depending, and removed by *certiorari* into the King's Bench from the assizes, as against the relators; but the Court doubted whether, as against the defendants, it had such a power of regulation. In this case the defendant had a soap and black ash manufactory at Battersea, near London, and an information was filed in the name of the Attorney-General by the neighbours; the Court refused a motion to suspend this alleged nuisance until a trial at Law; Lord Chancellor Eldon observing, that the question was, what amounted to a nuisance; that some manufactories had been held no nuisance, though they might destroy the whole comfort of life, as a sugar-house, or a brew-house, or the making of bricks, which were so in common parlance only; and that the Court was very cautious in granting injunctions in such cases *ex parte*, but that the Court will abate a nuisance on the public highway or in a harbour; all others must be tried by a jury; and Lord Eldon said, that the Court had no original jurisdiction to enjoin or regulate the proceedings on an indictment; but that circumstances might give that jurisdiction, as where the relators were the persons prosecuting, there the Court had a control by order personally affecting them, but that he doubted if he had the same control over defendants who had not come in. In an anonymous case (4), the Court refused a motion

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has jurisdiction, though, as a public nuisance, an object of prosecution by the Attorney-General.

No injunction on information at relation, as against a nuisance by an offensive trade, was granted without trial at Law.

Otherwise in nuisance on public highway or in a harbour.

(1) *Crowder v. Tinkler*, 19 Ves. 617.

(2) *Att.-Gen. v. Cleaver*, 16 Ves. 217.

(3) 18 Ves. 211-220.

(4) 2 Ves. Sen. 193.

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By the general rule no bill of peace before right at Law established.

To remove a work erected at great expense, notice not to proceed should have been given.

for liberty to re-erect a nuisance, and to be quieted in the enjoyment of it until the hearing of the cause; the Court said that the utmost it could do was to put it in a speedy method of trial, and that the general rule was that you must establish your right at Law before you bring a bill of peace.

46. To have a work erected at great expense, whether private or public, removed by this Court as a nuisance, the person complaining should have given notice not to proceed, otherwise the Court will leave the complainant to Law (1).

47. A party may so encourage another in the erection of a nuisance as to give him an equity for an injunction to restrain an action for damages, and a general allegation of such encouragement will let in evidence of particular acts of encouragement, and is therefore sufficient statement of the equity to preclude a demurrer; but Lord Chancellor Cottenham said, that there was no fact (in this case) before him to call for any opinion as to what degree of encouragement, or what circumstances leading to encouragement, would be sufficient for the purpose of entitling the plaintiff to the interposition of the Court (2).

48. Under the old practice the Court would grant an injunction before an answer for a plain apparent nuisance, on a certificate, affidavit, and notice to the party, his clerk in Court, or his solicitor; but in a case of a special nuisance the Court expected the party to shew his right, and how he was particularly aggrieved, before the writ could be granted (3).

49. A brewhouse is not necessarily a nuisance, and specific performance of an agreement to grant a building lease was decreed generally, although the plaintiff had erected a brewhouse on the land injurious to lessor's adjoining property (4).

50. Where a nuisance and purpresture (5) in a harbour are committed, an information in Equity lies to abate them (6). And on an information of the Attorney-General, at the relation of an individual, and a bill by the relator, the Lord Chancellor granted

(1) *Jones v. Royal Canal Company*, 2 Moll. 819.

(2) *Williams v. Earl of Jersey*, Cr. & P. 91.

(3) *Hinde's Chanc. Practice*, 591.

(4) *Gorton v. Smart*, 1 S. & S. 68, 66.

(5) Co. Litt. 277, from the French *pourpris*, an enclosure, v. 4 Bl. Com.

167.

(6) *Att.-Gen. v. Richards*, 2 Anstr. 602.

A brewhouse is not necessarily a nuisance.

an injunction *ex parte*, on affidavits, to restrain a purpresture in the River Thames; and it appearing that there had been no previous writ of *ad quod damnum*, and that an indictment in the King's Bench was depending against the defendants for the same act, the Lord Chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of defendants stating that the act complained of was beneficial to the navigation; it was also held, that it was immaterial to whom the soil belonged, it not being competent either to the Crown or to a subject to use it for any purpose amounting to a nuisance (1).

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In nuisance and purpresture in a harbour, it is immaterial to whom the soil belongs, neither the Crown nor a subject can use it for a purpose amounting to a nuisance.

51. Where a bill stated the plaintiff to be lessee of an ancient mill, and that the defendant had erected flood-gates and other works on the river which obstructed the plaintiff's mill, and prayed that the defendant might be decreed to pull down these works, and restrained from erecting new ones, such works having been erected and permitted to remain above three years; the Court considered this such a laches as to preclude the party from having relief in Equity without going first to Law and establishing the right there, and allowed a demurrer for want of Equity (2).

Laches by permitting flood-gates, &c., to remain above three years, and no relief without first establishing the right at Law.

52. In *Bannister v. Bigges* (3) the Court granted an injunction to restrain the further use of a rifle range for ball practice, which had been certified by the Secretary of State for War, until it should have been rendered free from danger to the plaintiff, his family, and workmen.

Use of rifle range restrained.

53. Where a local board of health had been restrained by a decree of the Court, at the suit of an individual, from allowing sewage to flow into a river after a certain date, and the board did not stop the sewage, but tried and failed to render it inoffensive, the Court held, that the board had committed a contempt of Court, and was not excused by the fact that the board was acting in the matter on behalf of the public, and carrying out duties imposed on it by Act of Parliament; and the Court granted an order for sequestration for contempt against the board, a public body having property vested in it for various purposes, it appearing

Board of Health restrained allowing sewage to flow into a river—not stopping it a contempt, and not excused because carrying out duties imposed by an Act.—Sequestration granted if there was property upon which it would operate.

(1) *Att.-Gen. v. Johnson*, 2 Wils. 87.

(2) *Weller v. Smeaton*, 1 Cox, 102.

(3) 34 Beav. 287; 11 Jur. (N. S.) 276.

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Interim injunction granted to restrain permitting an extremely dangerous and inflammable material to remain in densely populated neighbourhood—after protest by owner of adjoining property.

The Court restrains a nuisance which is permanent and serious.

The Court has regard to the prospective effect of a nuisance in diminishing value of land.

Owner of estate may have an injunction to restrain pollution of an ancient stream by sewage, before it has become a permanent and continuous nuisance

to the Court that there was property on which the sequestration would operate (1).

54. Where persons for their own convenience, and in order to dry an extremely dangerous and inflammable material (damp jute), brought it in large quantities upon property in a densely populated neighbourhood, and after protest by the owner of adjoining valuable property, Vice-Chancellor Sir W. P. Wood, at his instance, evidence being given of the danger of combustion, granted an interim injunction to restrain them from permitting the material to remain upon the property, and from bringing any more of it there, he undertaking forthwith to indict them for the nuisance, and to abide by any order as to damages (2). But upon appeal it was agreed that the injunction should be dissolved, the parties undertaking not to bring in any more jute, without prejudice to any question in the suit. The costs and all other matters to be disposed of by the Vice-Chancellor at the hearing.

55. The Court of Chancery will interfere by injunction to restrain a nuisance which is permanent and serious, and in determining whether relief ought to be granted regard will be had not only to the comfort and convenience of the occupier of the land for the time being, but to the prospective effect of the nuisance in diminishing the value of the land (3).

56. Where an ancient stream of water, of which a man has a right to the use, it flowing upon his estate, is perceptibly polluted by sewage being discharged into such stream or watercourse, and such sewage prevents such owner using the stream, the owner of the estate may come to the Court of Chancery to restrain the pollution and stop such discharge before it has become a permanent and continuous nuisance, and while the pollution is gradually increasing by an increased flow of sewage; and although the fact of prospective nuisance is not in itself a ground for the interference of the Court, yet if some degree of present nuisance exists the Court will take into account its probable continuance and increase; and, assuming that a prescriptive right could be acquired

(1) *Spokes v. Banbury Local Board of Health*, 11 Jur. (N. S.) 1010.

(2) *Hepburn v. Lordan*, 2 H. & M. 345; 11 Jur. (N. S.) 132, 254.

(3) *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161; L. R. 1 Ch. 349; 12 Jur. (N. S.) 308; 14 W. R. 92, 562.

of draining the sewage into the stream to the injury of the plaintiff (as to which the Court of Appeal abstained from giving an opinion), it could only be acquired by the continuance of a perceptible amount of injury for twenty years; and the evidence in this case was held not to be sufficient to shew this (1).

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57. The Court will interfere to restrain excavations which threaten danger to adjoining houses, though the actual resulting damage may be small (2).

Excavations threatening adjoining houses restrained.

58. Though there may be cases where the public might lose their right to an injunction by laches (3), this does not apply to a case of a gradually growing nuisance (4).

No laches against the public where nuisance grows gradually.

59. The Court will not restrain the erection of buildings which merely prevent goods displayed in a shop from being seen from places whence they would previously have been seen (5).

No restraint of buildings which prevent display of goods.

60. Where a gas company granted a lease of a piece of ground abutting on the Regent's Canal at Hackney, with a covenant by the lessee to erect a lime-kiln and keep up a road, and by the lessors to make the road, and, if it should be necessary to remove it (which they had power to do), to make a new one of like materials, and the lessee built the kiln and premises, and the lessors made the road, and in 1865 the lessors (having built two gasometers) proposed to erect a third and enlarge a basin or lay-by, which would render the diversion of the road necessary, but it was proposed to reinstate it with a slight curve; and the lessee filed a bill to restrain the erection of the gasometer and the alteration of the road; as to the gasometer, on the ground of nuisance and obstruction of the view of the plaintiff's premises; and as to the road, that it was a mere device to alter the road. On an interlocutory motion an injunction as to the gasometer was refused (and at the hearing of the cause the Vice-Chancellor said, that as to the ground that the gasometer would prevent the view mentioned in the suit, it was impossible that that could be a ground for an injunction), but as to the road an injunction was granted on the

(1) *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161; L. R. 1 Ch. 349; 12 Jur. (N. S.) 308; 14 W. R. 92, 562.

(3) *Att.-Gen. v. Johnson*, 2 Wils. 87.

(4) *Att.-Gen. v. Bradford Navigation Company*, 35 L. J. (Ch.) 619.

(5) *Smith v. Owen*, 35 L. J. (Ch.) 317.

(2) *Dent v. Auction Mart Company*, 35 L. J. (Ch.) 555.

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The Court will restrain a highway board from allowing fresh communications with sewer, which occasions a nuisance to inhabitants of adjoining parish.

usual undertaking as to damages; but the bill was afterwards, at the hearing of the cause, dismissed with costs, and an inquiry was then asked for as to damages; however, Vice-Chancellor Sir R. T. Kindersley said that he should be deviating technically from the course of the Court if he were to direct such an inquiry, at the same time dismissing the bill, and that it would be an anomaly; but the order of dismissal was made without prejudice to any application as to damages (1).

61. A Court of Equity will restrain the members of a highway board (being the local authority for carrying out the provisions of the Nuisances Removal Acts) from allowing any fresh communications to be made with a sewer, constructed by their predecessors in office, which occasions a nuisance to the inhabitants of the adjoining parish, by draining into a stream flowing through such parish, although, from the limited nature of their powers, no order can be made against the board which will have the effect of compelling them to abate the nuisance altogether, by stopping up the sewer, and ceasing to drain into the stream (2). Where a bill was filed to restrain a local board of health from discharging sewage into a river, so as to be a nuisance and injury to the plaintiff, Vice-Chancellor Sir R. Malins, finding that the plaintiff sustained no material injury, and that the nuisance, if any, had been to a great extent abated since the filing of the bill, refused an injunction, and dismissed the bill, but without costs, the plaintiff appearing to have had some justification for instituting the suit. In cases of this class, where important public interests are involved, such as the improvement of the drainage of a town, the Court will protect the private rights of the individual if affected in any material degree, but will at the same time have regard to the nature and extent of the alleged injury or nuisance and to the balance of inconvenience (3).

62. Where the defendant allowed a noxious and offensive refuse-water to flow from his manufactory into an old pit on his own land, but which percolated underground into the plaintiff's colliery, he was restrained by a perpetual injunction (4).

(1) *Butt v. Imperial Gaslight and Coke Company*, 14 W. R. 508.

(2) *Att.-Gen. v. Richmond*, L. R. 2 Eq. 306.

(3) *Lillywhite v. Trimmer*, 36 L. J. (Ch.) 525.

(4) *Turner v. Mirfield*, 34 Beav. 390.

63. On a bill to restrain a nuisance, a delay of six months in filing the bill, though important on an interlocutory application, is no bar to relief by injunction at the hearing of the cause (1).

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64. The collection of a crowd of noisy and disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainment is liable to an injunction; even though he has excluded all improper characters from the grounds, and the amusements in the grounds have been conducted in an orderly way, to the satisfaction of the police (2).

The collection of a crowd of noisy and disorderly people outside grounds where music and fireworks, is a nuisance.

The establishment of national schools on one of several lots of land is not a nuisance in the legal acceptance of the term, so as to entitle the owners of adjoining lots to an injunction; still, where purchasers of land in lots respectively covenant with the vendor not to allow to be done on their respective lots anything which shall be deemed a nuisance to the occupiers or proprietors for the time being of the adjoining property, the purchasers are entitled to the benefit of, and subject to the restrictions of, such covenant *inter se* (3). Where a circus, the performances in which were to be carried

A national school is not a nuisance.

on for eight weeks, was erected at a distance of 115 yards from the plaintiff's dwelling-house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten, and the noise of the music and shouting in the circus could be distinctly heard all over the plaintiff's house, and was so loud that it could be heard above the conversation in the dining-room, though the windows and shutters were closed and several persons were talking in the room; the Court held, that this was such a nuisance as a Court of Equity would restrain by injunction (4), and a perpetual injunction was granted to restrain the performances of the circus, on the ground that the performances caused an amount of noise such as to interfere with the ordinary peace and quiet of the dwelling-house. In a similar suit to restrain the erection of an intended circus at the distance of eighty-five yards from a dwelling-house, the bill was dismissed, on the ground that it

The noise from a circus may be a nuisance.

(1) *Turner v. Mirfield*, 34 Beav. 390.

(3) *Harrison v. Good*, 19 W. R. 346.

(2) *Walker v. Brewster*, L. R. 5 Eq. 25.

(4) *Inchbald v. Robinson*, *Inchbald v. Barrington*, L. R. 4 Ch. 388; 17 W. R. 459; 20 L. T. (N. S.) 259.

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Mere crowds going to and coming from a circus, not necessarily a nuisance.

If evidence satisfactory Court restrains nuisance without trying the question before a jury.

Smoke, noise, and offensive odours, may severally constitute a nuisance—the material question is, interference with ordinary comfort.

For an injunction the nuisance must be a material injury to property, or to the comfort of existence.

contained no allegation, and that there was no evidence in the suit that the performances would, by their noise, cause a nuisance to the plaintiff. The mere assembling of crowds of persons going to and coming from the performances at a circus, held in a covered building, is not necessarily a nuisance which a Court of Equity would restrain (1). If the evidence is satisfactory, the Court will grant an injunction against a nuisance, without having the question whether there is a nuisance tried before a jury (2).

65. Smoke, unaccompanied with noise or with noxious vapour, noise alone, and offensive odours alone, although not injurious to health, may severally constitute a nuisance. The material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence (3). In this case an injunction was granted at the suit of a lessee of two semi-detached houses within the town, but at the outskirts, to restrain the issuing of smoke and effluvia from a factory-chimney, and the making of noise in the factory, although it was situate in a manufacturing town, it being proved that such smoke, effluvia, and noise, were a material addition to previously existing nuisances.

66. The Court will restrain the continuance of a nuisance wherever substantial damages might be recovered in respect of it by an action (4).

67. A nuisance against which a Court of Equity will grant an injunction must be a material injury to property, or to the comfort of the existence of those who dwell in the neighbourhood; and where a defendant, having taken lands adjoining the residence, lake, and grounds of the plaintiff, made preparations for burning bricks upon them, and commenced burning one clamp at a distance of 1447 feet from the plaintiff's house, and 422 feet from the lake, upon the margin of which lake was a cottage occupied by a person in the plaintiff's employment, and the plaintiff obtained an interlocutory injunction, upon which the fire was at once extinguished,

(1) *Inchbald v. Robinson, Inchbald v. Barrington*, L. R. 4 Ch. 388; 17 W. R. 459; 20 L. T. (N. S.) 259.

(2) *lb.*

(3) *Crump v. Lambert*, L. R. 3 Eq. 409; affirmed on appeal 17 L. T. (N.S.) 133.

(4) *lb.*

and nothing further was ever done, though it was admittedly the defendant's intention to burn bricks; Lord Justice Rolt held, on appeal from the Master of the Rolls, that the actual facts did not amount to a nuisance; and that as to future injury there was not sufficient, having regard to the proximity of the clamp, nor to the estimated degree of damage, nor upon the circumstances generally, to warrant an interlocutory injunction (1).

68. Where the owner of an ancient paper-mill, where the paper had been made from rags, introduced a new vegetable fibre, and carried on the works upon the same scale for making paper from this new material, and for more than twenty years before this change the refuse arising from the paper manufactory had been discharged into a stream, the River Chess, which ran past the plaintiff's house; the Court, on appeal from a decree of Vice-Chancellor Sir J. Stuart, in effect restraining the defendant from polluting the stream to a greater extent than it had been polluted by the former proprietors of the mills, held that the easement to which he was entitled was to be presumed to be, not a right to pollute the stream by discharging into it the washing produced by the working up of rags, but a right to discharge into it the washing produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not increasing, as against the servient tenement, to any substantial or tangible degree, the amount of pollution, and that the onus lay on the plaintiffs to prove any increase of pollution; and the Lord Justice (Lord Cairns) reversed the decree of the Vice-Chancellor on the ground that the plaintiff, on the evidence, had not discharged the onus that lay on him, of shewing a greater amount of pollution and injury than during the former working of the mills (2).

69. A nuisance cannot be justified by the existence of other nuisances of a similar character, if it can be shewn that the inconvenience is increased by the nuisance complained of; and the fact that a stream is fouled by others is not a defence to a suit to restrain the fouling by one (3). The owner of land on the banks

A nuisance cannot be justified by existence of others similar, if the inconvenience is increased.

(1) *Luscombe v. Steer*, 17 L. T. (N.S.) 229; 15 W. R. 1191. (2) *Bazendale v. McMurray*, L. R. 2 Ch. 790; 16 W. R. 32.

(3) *Crossley v. Lightowler*, L. R. 2 Ch. 478; 36 L. J. (Ch.) 584.

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Where there is a prescriptive right of fouling a stream, the fouling must not be considerably enlarged.

of a river can maintain a suit to restrain the fouling of the water of the river, without shewing that the fouling is actually injurious to him; and where C., wishing to prevent the water of a river from being fouled by some dye-works, purchased from the owners of the dye-works a piece of land on the banks of the river without communicating to them his object; the Lord Chancellor (Lord Chelmsford), held, affirming, with variations, the decision of Vice-Chancellor Sir W. P. Wood, that in the absence of any express reservation by the owners of the dye-works of the right of fouling, C. could maintain a suit to restrain it (1).

70. Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people (2).

71. Where, by a public Act passed in the reign of Henry VIII, the corporation of the city of Exeter were empowered to remove obstructions to the navigation of the river Exe, paying compensation to the owners of the soil where the obstructions were situated; the Master of the Rolls (Lord Romilly), held, first, that this Act did not confer the conservancy of the river on the corporation; secondly, that it did not entitle the corporation to file a bill in Equity to restrain the erection of a pier in the river; and thirdly, that it did not confer any right or privilege on the corporation within the meaning of sect. 14 of the General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), so as to prevent the erection of a pier in the river without their consent being obtained (3).

72. A bill and information filed by and at the relation of a millowner, to restrain the local board of health of a town from discharging sewage into a river, were dismissed with costs, on the ground that the injury proved was trifling (4).

73. In *North Staffordshire Railway Company v. Tunstall Local Board of Health* (5), an injunction granted to restrain a local board of health from draining town sewage into a stream which served as a feeder to the B. canal, and as such vested in the plaintiffs (a railway company) by Act of Parliament to a distance

(1) *Crossley v. Lightowler*, 12 R. 2 Devon, L. R. 10 Eq. 232.

Ch. 478; 36 L. J. (Ch.) 584.

(4) *Att.-Gen. v. Gee*, L. R. 10 Eq.

(2) *Ib.*

131.

(3) *Corporation of Exeter v. Earl of*

(5) 39 L. J. (Ch.) 131.

of 500 yards from a certain junction. Where a corporation had erected works so that the sewage of the town flowed into an ancient brook, which passed the mills of a manufactory, and thereby the brook or stream was so far polluted as to affect the health of the workmen and others in the manufactories residing in the neighbourhood of the stream, and also affected the property of the manufacturers; and the balance of the scientific evidence proving that what had been done by the corporation caused a nuisance, and was injurious to the public health; the Court held, that the relators were entitled to an immediate injunction to restrain any further extension of the works by which the pollution of the stream had been caused (1). The fact that commissioners alter a sewer, making it of larger capacity and at a lower level, is *prima facie* evidence that they intend to carry into it sewage not previously drained into the old sewer; and the Court granted an injunction to restrain the defendants from causing any new sewer to open into a river at any point above a place named (2).

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Sewage polluting stream, and affecting public health, immediate injunction.

74. It is no answer to a complaint by a manufacturer of a nuisance to his trade, to say that the injury is felt only by reason of the delicate nature of the manufacture (3). But the circumstances that the injury done is accidental and occasional only, that careful precautions are taken, and that there is no exceptional risk, such as arises from the storage of gunpowder or highly inflammable materials, are grounds for refusing an injunction, and leaving the plaintiff to his remedy by action (4); and where a maker of cocoa-nut matting, using chloride of tin in his bleaching liquid, complained of injury to his fabrics by reason of the chloride of tin being discoloured by sulphuretted hydrogen thrown off by the defendant in a manufacturing process carried on upon adjoining premises; and the evidence shewed that, owing to the defendant's precautions, on three occasions only had an appreciable escape taken place, and then only from accidental defects which were immediately remedied; Vice-Chancellor Sir W. P. Wood refused an injunction without prejudice to an action (5).

Delicate nature of manufacture does not disentitle to an injunction—but if injury is accidental and occasional, careful precautions taken and no exceptional risk, no injunction.

(1) *Att.-Gen. v. Halifax (Corporation)*, 17 W. R. 1088; 27 L. T. (N. S.) 52.

18 W. R. 885.

(3) *Cooke v. Forbes*, L. R. 5 E. 1. 166.

(4) *Ib.*

(2) *Holt v. Mayor, &c., of Rochdale*,

(5) *Ib.*

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The cesser for
twenty years
of a nuisance
of long stand-
ing entitles to
restrain.

75. Although a nuisance be of long standing, yet if the exercise of it has been interrupted for twenty years, Vice-Chancellor Sir W. P. Wood held that the cesser of the right for this period entitles to complain of the nuisance by bill (1).

76. Brick-burning is a nuisance to persons living within the limits affected by it, and 240 yards is not an extreme limit, and, therefore, an injunction to abate such a nuisance will be granted (2).

77. In cases of private nuisance the jurisdiction of Courts of Equity and of Law is often concurrent, though many cases will sustain a legal action which would not justify relief in Equity (3). The established rule on this subject is, that Chancery has power to interpose in behalf of one who is injured by a continuing, permanent, or recurring private nuisance, unless the injury be such as may be compensated in damages (4). So, when a nuisance is likely to occasion a special injury to one individual, which cannot well be compensated in damages, Equity will entertain jurisdiction of the case at his suit (5).

78. It is held in recent American cases that Chancery may grant an injunction against an act threatened which, if committed, would be punishable under the criminal laws as a nuisance (6), where the complainant shews that acts about to be done by the defendant, amounting to a public nuisance, will also cause special damage to himself (7); as, if they will produce extraordinary injury to his property, irreparable in damages, or without a multitude of suits (8). So, Chancery will restrain a party from doing an act injurious to an individual, or which may be prejudicial as a public nuisance, pending judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness, is to be determined (9).

(1) *Roberts v. Clarke*, 18 L. T. 351 (Amr.)
(N. S.) 49.

(2) *Ib.*

(3) *Parker v. Winnipiseogee, &c.* 2 Black. 545 (Amr.)

(4) *Norris v. Hill*, 1 Man. 202;
Clack v. White, 2 Sw. 540; 1 Gill. & J. 184 (Amr.)

(5) *Milhau v. Sharp*, 28 Barb. 228 (Amr.)

(6) *The People v. St. Louis*, 5 Gilm.

(7) *Walker v. Shepardson*, 2 His. 384; *Mississippi, &c. v. Ward*, 2 Black. 485; *Zubriskie v. Jersey, &c.*, 2 Brasl. 314 (Amr.)

(8) *Purriah v. Stephens*, 1 Oreg. 73 (Amr.)

(9) *Williamson v. Carnan*, 1 Gill. & J. 184 (Amr.); (Hilliard on Injunc. 300, 314, 2nd Ed.)

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1. The tendency of the authorities upon the subject of injury to real property is to break down the old distinction that existed between waste and trespass. And where a defendant is in possession of an estate, and a plaintiff claiming possession of it seeks to restrain him from cutting down trees, and digging sods, and other such like acts, the Court will not interfere, unless the acts complained of amount to such flagrant instances of spoliation as to justify the Court in departing from the general rule; but where a plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under colour of right, then the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at Law, though if the acts tend to the destruction of the inheritance the Court will grant an injunction; but where a plaintiff in possession seeks to restrain one who claims by an adverse title, the tendency of the Court will be to grant an injunction, at least when the acts committed do or may tend to the destruction of the estate. And where a person, not being in possession of an estate, claimed it as heir-at-law, and entered upon it, cut down trees, and cut sods, and threatened to repeat his conduct in order to establish his alleged title as against the possessor, who, by himself and his ancestors, had been in possession of the estate for upwards of eighty years; Vice-Chancellor Sir R. T. Kindersley, upon a bill filed by the possessor against the claimant, held, that as the acts of the defendant might be injurious to the inheritance, he must be restrained by injunction from committing them (1).

2. In *Davenport v. Davenport* (2) it was held that a party out of possession claiming real estate by title simply adverse to that of the party in possession cannot be heard in a Court of Equity, upon an application to restrain the party in possession from committing acts of trespass productive of irreparable waste, until he has established his title at Law; and a demurrer for want of equity, on the ground that in cases of trespass against a party in possession the

The tendency is to break down old distinctions between waste and trespass. Defendant in possession, Court does not interfere unless flagrant spoliation.

Plaintiff in possession and defendant stranger, no injunction unless special circumstances or destruction.

Plaintiff in possession, defendant claiming by adverse title, tendency to grant injunction, at least when acts may tend to destruction.

(1) *Lowndes v. Bettle*, 33 L. J. (Ch.) 399; 10 L. T. (N. S.) 55.
451; 10 Jur. (N. S.) 226; 12 W. R. (2) 7 Hare, 217.

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Court refuses to act until the right is established at Law, was allowed, with costs, to the bill of a plaintiff alleging that, under a settlement thereby stated, he was entitled to an estate of which the defendant was in possession, and had been so for nineteen years, that the plaintiff had not discovered his title until a very recent period, and that he had since brought an ejectment against the defendant to recover the premises, which action stood for trial at the next assizes, and praying an injunction to restrain the defendant from cutting down and selling ornamental and other timber of great value, and thereby occasioning irreparable injury to the estate, which the bill charged that the defendant threatened and intended to do. Vice-Chancellor Sir J. L. Knight Bruce, in *Haigh v. Jagger* (1), refused an injunction to restrain a party claiming by an adverse legal title from committing acts of trespass (breaking into and entering upon a bed of coal) alleged to be productive of irreparable waste, under the special circumstances of the case; but the Vice-Chancellor said that he was not, however, convinced that where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another, by whom the estate is, whether at Law or in Equity, claimed against him, without any privity between them, such a state of things, if the party in possession, by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does, of necessity, prevent a Court of Equity from interfering (before any judgment at Law or decree in Equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts. In *Norway v. Rowe* (2) an injunction was granted to stay waste against a defendant, who insisted on his own title, but admitted he received possession from the plaintiff's tenant without the plaintiff's knowledge, in breach of the tenant's duty. But in *Pillsworth v. Hopton* (3) Lord Chancellor Eldon refused an injunction to stay waste against a defendant in possession claiming by an adverse title, the tenants having attorned, the plaintiff having failed in ejectment (but, as the bill alleged, not on the merits), and both plaintiff and defendant setting up pretences of title. In

(1) 2 Coll. 231.

(2) 19 Ves. 154.

(3) 6 Ves. 51.

Courthope v. Mapplesden (1) the Court, on a motion by a landlord, granted an injunction against a trespasser cutting timber by collusion with tenant, but without prejudice to the case of a mere trespass. In *Smith v. Collyer* (2) the Court refused an injunction on behalf of plaintiffs, who, by their guardian, were in receipt of the rents, against the defendant, claiming as heir, and insisting the will was not well executed, cutting timber, the title being disputed as between devisee and heir-at-law; Lord Chancellor Eldon saying that it was quite a new case, and that it was not a case of waste, but trespass. In *Mortimer v. Cotterell* (3) the Court refused to interfere, by way of injunction, to stay waste, on the ground that the defendant was a mere stranger guilty of forcible entry, and might be turned out of possession immediately.

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3. It is a question of degree, to be established by evidence, whether the working of a dormant or abandoned mine by a tenant for life is waste or not; and, *semble*, that a mine, the working of which had been discontinued for twenty or thirty years in consequence of its not having been remunerative, might after that time be worked by a succeeding tenant for life; but a mine, the working of which has been abandoned by the owner of the inheritance for the advantage of the property, cannot be worked by a succeeding tenant for life (4).

It is a question of degree whether working a dormant mine by tenant for life, is waste.

4. Deer in a park, when reclaimed, are personal chattels, and cease to be parcel of the inheritance, and the Court will not interfere to restrain waste in not keeping up the herd; and therefore, in a suit by incumbrancers of a tenant for life of a deer park and other property, an application by remaindermen to prevent the receiver from letting the park except as a deer park, and with proper covenants for preserving the deer, was refused (5); and in this case the Court stated the evidence upon which deer in a park will be considered tame (6). To break up a rabbit warren, unless it be a warren by charter or prescription, is not waste at Common Law, and the Court will not grant an injunction to prevent it (7); *sed quære*, if the warren be demised as such (8).

The Court will not restrain waste in not keeping up a herd of reclaimed deer.

Breaking up a rabbit warren not waste, unless one by charter or prescription.

(1) 10 Ves. 290.

(2) 8 Ves. 89.

(3) 2 Cox, 205.

(4) *Bagot v. Bagot, Legge v. Legge*,
32 Beav. 509; 9 L. T. (N. S.) 217.

(5) *Ford v. Tynte*, 2 J. & H. 150;

31 L. J. (Ch.) 177.

(6) *Ib.*

(7) *Lurting v. Conn*, 1 Ir. Ch. R. 273.

(8) *Ib.*

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No injunction
against lessee
covenanting
not to commit
waste, where
damage nomi-
nal—where
not contem-
plating fur-
ther waste,
nor asserting
right.

5. Where a lessee, bound by covenant not to commit waste, has committed acts of waste, for which damages merely nominal would be given, the Court of Chancery will not entertain a suit against him founded on those acts of waste, where it appears that he does not contemplate committing any further waste, nor assert a right to commit it; and a tenant by replying to a letter charging him with the commission of waste, and requiring him to make compensation for it, "that he is prepared to defend any action which may be brought against him, and to shew that, so far from having committed injury, he has materially improved the premises demised to him," does not assert a right to commit the waste complained of (1).

Equitable
waste applies
to all cases of
estates limited
in succession.

6. The doctrine of equitable waste applies equally to all cases of estates limited to go in a course of succession, whether that object is effected by creating life interests or estates in fee with executory devises over; but *quære*, whether a tenant in fee simple, subject to an executory devise over, can, in the absence of any indication of a contrary intention, be restrained from committing legal waste; but, under a devise of a mansion-house and the estate with the appurtenances to A. in fee, subject to an executory devise over in the event of his dying without leaving issue to B. for life sans waste, remainder to C. in fee, the Lord Chancellor held (affirming the decision of Vice-Chancellor Sir W. P. Wood), that A. was entitled to commit legal waste, but not entitled to commit equitable waste by cutting down timber standing for ornament or shelter with reference to the mansion-house, nor by cutting down immature trees or unripe timber. The Vice-Chancellor, in his judgment, said that the testator (in this case) had created a tenancy in fee, with an executory devise over, and also a tenancy for life sans waste, and that there was no intention intimated to give to the tenant in fee any larger rights in respect of timber than to the tenant for life; that at Law their rights would be the same, and there was no reason to be derived from any intention discoverable in the will why they should not be identical in Equity (2).

Equitable
waste is

7. Equitable waste is that which a prudent man would not do

- (1) *Doran v. Carroll*, 11 Ir. Ch. Rep. 379. Jur. (N. S.) 647; 29 L. J. (Ch.) 470; 8 W. R. 387; 6 Jur. (N. S.) 809; 29
(2) *Turner v. Wright*, Job. 740; 6 L. J. (Ch.) 598; 8 W. R. 675.

in the management of his own property: *per* Lord Chancellor Campbell (1). The Court will not maintain an injunction against equitable waste, unless it be proved that equitable waste has been committed, or is threatened (2).

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what a prudent man would not do. No injunction against equitable waste unless committed or threatened.

8. Where a tenant for life under a settlement without impeachment of waste, for valuable consideration had assigned to the trustees of the settlement "all and singular the timber and timber-like trees then growing and being, and which might thereafter grow and be, upon" the settled estate, the Court held, this included the "thinnings" of the woods, and that it rested solely with the trustees to determine what thinnings should be made, and at what time (3).

9. The Court will restrain a purchaser of an estate who has obtained possession under his contract from doing any acts of waste and destruction (4).

Waste by purchaser is restrained.

10. The Court will, at the instance of a person merely alleging a legal title to realty, grant an injunction to restrain persons in possession of an estate from committing malicious and destructive waste (5); but such a case must be clearly made out, and a mere general allegation that the tenant has cut down a considerable quantity of timber, some of which was of an ornamental character, and other portions of which were unripe for cutting, is insufficient (6); the authorities as to the jurisdiction of the Court to interfere at the instance of parties claiming real property under a legal title, by appointing a receiver of the rents and profits and by injunction to restrain waste, establish these propositions—First:

The Court, upon allegation of legal title, restrains wilful and malicious waste by persons in possession.

In the absence of fraud, and where there is no privity between the parties, the Court will not interfere, at the instance of a person so claiming, to grant a receiver against parties in possession. Secondly: Nor will it interfere, at the like instance, to restrain waste, except malicious or destructive waste; *e.g.*, by pulling down the capital messuage, stripping the estate of its timber, or other

In absence of fraud, and being no privity, Court will not, at the instance of party claiming under a legal title, restrain a party in possession committing waste, except malicious or destructive.

(1) *Turner v. Wright*, Joh. 740; 6 Jur. (N. S.) 647; 29 L. J. (Ch.) 470; 8 W. R. 387; 6 Jur. (N. S.) 809; 29 L. J. (Ch.) 598; 8 W. R. 675.

(2) *Potts v. Potts*, 3 L. J. (Ch.) 176.

(3) *Gordon v. Woodford*, 6 Jur. (N. S.) 59.

(4) *Crockford v. Alexander*, 15 Ves. 138; *Marshall v. Watson*, 25 Beav. 501.

(5) *Talbot (Earl) v. Scoti*, 4 K. & J. 96; 4 Jur. (N. S.) 1172; 27 L. J. (Ch.) 273.

(6) *Ib.*

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Flagrant acts of a malicious or destructive character are, at present day, restrained, and before judgment at Law, and plaintiff out of possession and his title denied.

like acts which no owner would do, or which would destroy the property before they could be arrested at law. Thirdly: But flagrant acts of this exceptional character would, at the present day, be restrained, and that before judgment at Law; and notwithstanding plaintiff were out of possession, and his title denied on oath by the defendant. In this case the bill alleged that the plaintiff was Earl of Shrewsbury, and entitled as such to real estates inalienably annexed to the Earldom by Act of Parliament, his title as to part called the "settled estates" being legal, and as to the rest, called the "unsettled estates," being equitable; that his claim to the Earldom had been heard in the House of Lords, before a committee of privileges, who had already expressed a strong opinion (although they had not actually decided) in his favour; that the defendants, claiming under a will of the late Earl, "by favour of some of the tenants" had entered into receipt of the rents of the settled estates to an amount exceeding £25,000 a year; and that they had cut down considerable quantities of timber on the estates generally, some of an ornamental character and some not ripe for cutting, and charged that many of the tenants of the settled estates, by reason of the conflicting claims to the Earldom, had refused to pay their rents to the plaintiff or defendants, by reason whereof rents exceeding £5000 a year were in danger of being lost; and prayed that, pending the plaintiff's proceedings to establish his claim to the Earldom, and his proceedings by ejectment, which he offered to bring when that claim was established, a receiver might be appointed, and the defendants restrained from cutting timber on the estate. A demurrer was allowed to so much of the bill as sought relief in respect of the settled estates, the Court being of opinion that the amount at stake did not affect the question; that the unpaid rents need not be lost, since, if an action were brought, they could be paid either to the plaintiff or into Court upon interpleader, and that the waste alleged was not such as to justify interference; and to so much of the bill as sought relief in respect of the unsettled estates, a plea that the plaintiff was not Earl of Shrewsbury was allowed (1).

- Defendant in 11. In *Neale v. Cripps* (2), Vice-Chancellor Sir W. P. Wood,
(1) *Talbot (Earl) v. Scott*, 4 K. & J. 96; 4 Jur. (N. S.) 1172; 27 L. J. (Ch.) 273.
(2) 4 K. & J. 472.

having granted an interim injunction, with leave to serve a notice of motion for an injunction, upon such notice being served, and the defendants not appearing, granted an injunction to restrain, until the hearing or further order, a defendant in possession from cutting down any timber or timber-like trees standing or growing on the estate, and from removing or disposing of such as might already be cut, upon a motion by a plaintiff claiming under a title at Law, and who had commenced an action of ejectment in respect of the premises.

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possession restrained cutting and removing timber at suit of plaintiff claiming title at Law, who had commenced ejectment.

12. Where a testator had left his mansion-house on the B. estate, and had gone to reside on another estate at the distance of about eight miles, and had pulled down the B. mansion-house, cut down some of the ornamental timber about it, turned the estate into a cover for game, and altogether had acted so as to shew that he had no intention that the mansion-house should be rebuilt; the Lords Justices (reversing a decision of Vice-Chancellor Sir W. P. Wood), held, that the rest of what had originally been ornamental timber on the B. estate was not, as between the parties claiming under the will, protected as ornamental, but might be cut by a tenant for life in possession whose estate was without impeachment of waste, except as to buildings; and also holding that timber, to be ornamental, so as to entitle it to the protection of the Court against equitable waste, must be connected with or adjacent to a residence; and in this case the testator, when he did the above acts, being only tenant for life in possession, with an ultimate reversion to himself in fee expectant on the failure or determination of a subsequent estate for life, and raising estates tail which did not fall and determine till after his death, the Lords Justices held, that, as between the parties claiming under his will, the case stood on the same footing as if he had been entitled in fee simple in possession (1). In this case, A., as devisee of the testator, being tenant for life without impeachment of waste "other than and except voluntary waste in pulling down houses or buildings, and not rebuilding the same, or others of equal or greater value," with remainder to his first and other sons successively, with remainders over, and being in possession, pulled down the mansion-house on

Timber to be ornamental so as to be entitled to protection against equitable waste, must be connected with or adjacent to a residence.

(1) *Micklethwait v. Micklethwait*, 1 De G. & J. 504; 3 Jur. (N. S.) 1279; 26 L. J. (Ch.) 721; 3 Jur. (N. S.) 765.

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the estate; whereupon B., the next tenant for life in remainder, filed a bill against A., praying that he might be decreed to complete a suitable mansion, and to give a sufficient security for that purpose; and A. having, by his counsel, undertaken to erect on the estate a substantial mansion-house, exceeding or at least equal in value to the mansion-house demolished; the Court directed the cause to stand over, with liberty to apply, it appearing that A. intended to erect a suitable mansion-house, and that there had been no delay on his part in carrying out his intention, but that the person entitled to the next vested remainder was not entitled to have a receiver of the rents appointed in order to secure the rebuilding of the mansion (1).

No interference unless danger from mode in which tenant for life deals with the property—Keeping part of corpus in hand about three months, not waste.

Tenant for life sans waste, &c., not interfered with, in exercise of his legal powers, unless acting inequitably to remaindermen.

No inference trees left for ornament, unless an act of dedication.

Saplings and hedge-row trees, not within the doctrine.

13. A Court of Equity will not interfere unless it is shewn that there is danger from the mode in which a tenant for life in possession is dealing with the property; and the mere fact of a tenant for life keeping on hand for about three months part of the *corpus* for the alleged purpose of an eligible investment does not amount to waste, nor is it in derogation of the rights of those entitled in reversion (2).

14. A tenant for life sans waste will not be interfered with in the exercise of his legal powers, unless he is proceeding to use those legal powers in a manner inequitable towards those in remainder; and therefore he may fell and sell trees planted for ornament, if done in a proper course of husbandry (3).

15. Where an owner of an estate, with residence, had purchased adjoining lands with ornamental woods, the Court would not, from that fact alone, infer that he intended to be left standing for ornament all such trees as he did not in his lifetime cut down; there must be some act of dedication, *e.g.*, planting an avenue, cutting a vista, erecting obelisks, &c.; and a tree or trees may be highly ornamental, and yet not be entitled to the protection of the Court as being planted or left standing for ornament; and saplings are not within the doctrine; nor are hedge-row trees, or any trees, however ornamental, if not planted also for profit, within the doctrine (4).

(1) *Micklethwait v. Micklethwait*, 1 De G. & J. 504; 3 Jur. (N. S.) 1279; 26 L. J. (Ch.) 721; 3 Jur. (N. S.) 765.

(2) *Dutt v. Dossee*, 6 Moo. Ind. App. 433.

(3) *Hulliwel v. Philips*, 4 Jur. 607.

(4) *lb.*

16. Where A. had, on his marriage, settled his estate on himself for life "without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses and buildings to go to decay, and in not repairing the same," the Master of the Rolls held, that his assignee was entitled to cut all such timber not planted or left for ornament, as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut, in a due course of management (1).

17. It is laid down by Vice-Chancellor Sir W. P. Wood, in *Powys v. Blagrove* (2), that Courts of Equity have no means of interfering in cases of permissive waste by a tenant for life of real property; and that there is no implied trust to keep the property in repair imposed upon a tenant for life under a will; for if there were, he could not convey away his life estate without committing a breach of trust; nor if he did, could he get rid of the trust by so doing; and that a trustee to whom real property is devised in trust for one for life cannot interfere with the possession of the equitable tenant for life because he neglects to keep the property in repair; and that, therefore, such a trustee is not liable to the remainderman for the neglect of the tenant for life to repair; but if the tenant for life is committing active waste it seems that the trustee may, and properly ought to, interfere—at least, if the persons entitled in remainder are under disability. And the Court of Appeal also held that a Court of Equity would not interfere, at the instance of a remainderman, in cases of permissive waste, either by injunction or to give satisfaction against an equitable tenant for life in possession (3). In this case the testator, by his will, directed his trustees, after payment of the expenses of keeping his estates in repair, and all such costs as "my said trustees shall expend or be put unto by means of the trusts hereby reposed on them" to pay out of the overplus, rents, and profits, certain sums, and after payment thereof to pay the rents to A. and B. successively for life, with remainder to trustees to preserve, with remainder to the first and other sons of B. successively in remainder, and the several heirs

No interference in cases of permissive waste by tenant for life.

No implied trust in devise for life to keep property in repair.

Trustee cannot interfere with possession of equitable tenant for life.

If tenant for life commits active waste, trustee should interfere.

(1) *Vincent v. Spicer*, 22 Beav. 380; (3) *Powys v. Blagrove*, 4 De G. M. 2 Jur. (N. S.) 654; 25 L. J. (Ch.) 589. & G. 448; 24 L. J. (Ch.) 142.
(2) 1 Kay, 495; 18 Jur. 462.

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male of the bodies of such sons; on a bill filed by the trustees, at the instance of one of the remaindermen in tail, against the second tenant for life, for the purpose of making him accountable for permissive waste, the Court of Appeal (affirming the decision of Vice-Chancellor Sir W. P. Wood dismissing the bill) held, that the costs of the trustees, whose bill was dismissed, ought to be paid out of the *corpus*, and not out of the rents and profits of the estate (1). But in *Caldwell v. Baylis* (2) an injunction was granted against permissive waste by a tenant for life, *i.e.*, "against permitting or suffering any further or other waste until answer or further order," upon an affidavit shewing the defendant to be devisee for life, "keeping the buildings in tenantable repair," with an ultimate devise, which took effect, to the plaintiffs as tenants in common, and shewing that the defendant had permitted the premises to grow ruinous for want of repairs; and where a devise to A. and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family," was declared to be an estate for life by a decree at the Rolls, and a trust as to the remainder in fee for the plaintiff, the devisee was enjoined from cutting timber pending an appeal (3).

Devisee for life "keeping, &c. in repair," restrained committing permissive waste.

Devisee for life being also trustee as to the remainder in fee, restrained cutting timber.

Trustees will be restrained cutting down ornamental trees, unless they are prejudicial—they should obtain the assent of beneficiaries, or authority of Court.

18. Trustees in whom an estate is vested ought not to cut down ornamental trees alleged to be prejudicial without first applying to the parties beneficially interested for their assent, or to the Court for its authority, and the *onus* of shewing that the trees are prejudicial lies on the trustees; and a perpetual injunction was granted against trustees who had cut down three ornamental trees and had failed in proving to the satisfaction of the Court that they were prejudicial to the residence; the Court at the same time observing that there was nothing like wanton destruction on the part of the trustees, and that they had acted *bonâ fide*, and the bill, being filed by a beneficiary against trustees and a tenant to whom the trustees had let the estate (a mansion and land) to prevent equitable waste, was dismissed with costs as against the tenant, it not being shewn that he had committed, or intended to commit, any waste, though some had been committed by the

(1) *Powys v. Blagrove*, 4 De G. M. & G. 448; 24 L. J. (Ch.) 142.

(2) 2 Mer. 408.

(3) *Wright v. Atkyns*, 1 V. & B. 313; see also 19 Ves. 299; 17 Ves. 255; Coop. 111; T. & R. 143.

trustees at his request, pending the treaty between them for the letting of the premises, but of which he refused to become tenant unless the trees were cut (1).

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19. Where a rector during four years had cut down a large number of timber trees, more than sufficient to be applied for the purposes of the repairs of the rectory buildings, and in 1851, when no timber was necessary for the repairs, had cut down other timber trees, and of these trees part were supplied for the repairs, others were sold to a carpenter, who employed other timber more suitable for repairs, and other parts were sold at auction, in lots, and some few trees were not accounted for; but the rector had expended on the rectory buildings, and on farm improvements, beyond the produce of the sales of timber, the sum of £150, besides

a considerable outlay in underdraining; on a bill filed by the patron against the rector, Vice-Chancellor Sir James Parker granted an injunction restraining the rector from felling timber on the rectory lands, save only for necessary repairs (2); but if the timber had been cut and sold merely for the purpose of providing other timber more suitable for repairs, the Court would not have interfered upon this, an interlocutory motion for an injunction (3); but at Common Law the parson, with the consent of the patron and ordinary, may cut timber and open mines; and this Court would have no difficulty, on a proper application, in directing timber to be cut, and the purchase-money to be applied for the benefit of the living; but a rector has no more extensive privileges, nor is there any principle of Law by which a rector can obtain more extensive privileges, as to waste than an ordinary tenant for life (4). However, in *Holden v. Weekes* (5) it is queried by Vice-Chancellor Sir W. P. Wood, whether an incumbent, with the consent of the patron and ordinary, can open mines under the glebe.

A rector will be restrained felling timber, except for necessary repairs.

At Common Law the parson, with consent of patron and ordinary, may cut timber. Court will, if necessary, direct timber to be cut.

Rector has not more privileges as to waste than tenant for life.

20. The patron is the proper person to institute a suit for the purpose of restraining waste by the incumbent, but the patron coming to the Court to restrain waste is not entitled to an account (6).

Query, whether with consent of patron and ordinary, he can open mines.

(1) *Campbell v. Allgood*, 17 Beav. 623.

(3) *Ib.*

(2) *Duke of Marlborough v. St. John*, 5

(4) *Ib.*

De G. & Sm. 174.

(5) 6 Jur. (N. S.) 1288.

(6) *Ib.*

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Restriction on legal power connected with a trust more readily enforced, *semble*.

Court will execute trust of money for taste or ornament, *semble*.

The application of the doctrine of equitable waste, controls excessive use of legal power incident to an estate, *sans*, &c.

In the preservation of ornamental timber, that planted and left standing for shelter or ornament is alone protected.

21. Vice-Chancellor Sir G. J. Turner, in *Marker v. Marker* (1), intimated that it was his opinion that the Court might more readily act in enforcing a restriction on the exercise of the legal power in a matter of taste or ornament, where the restriction was connected with a trust, than in the case of equitable waste in the absence of any such trust; and that the case of a trust or restriction created for the preservation of ornamental timber was not like a trust for purposes of benevolence (as to which the objects are unlimited, and no standard can be found), but was a trust or restriction which the Court will endeavour to execute or enforce; and that there were cases in which the Court might execute a trust for the application of money to the purposes of taste or ornament, and in doing so might, in the absence of any prescribed standard, or if the standard were more or less indefinite, act upon the opinions of persons who were consulted by others in such matters, as it acts in other cases upon the opinions of persons of science (2).

22. The Court by applying the doctrine of equitable waste, controls and restrains the excessive use of the legal power incident to an estate impeachable of waste, but with reference only to the presumed will and intention of the party by whom the power was created (3).

23. In the preservation of ornamental timber the protection of the Court is confined to timber planted and left standing for shelter or ornament, and the question, whether the protection should be extended to particular timber is, therefore, one of fact, and the determination must depend upon the evidence which can be collected to establish the fact (4).

24. Where a tenant for life without impeachment of waste had sold a quantity of timber trees, which Vice-Chancellor Sir G. J. Turner afterwards restrained him from felling, on the supposition that it would be equitable waste, the Vice-Chancellor held that the purchasers of the timber were not necessary parties to the injunction suit, but required the plaintiff to give security to the defendant, not only for the value of all the trees which the defendant should be prevented from cutting by the injunction, but also for any loss or damage the defendant might incur or sustain by reason of his being prevented from completing the sale (5).

(1) 9 Hare, 1, 18; 15 Jur. 663; 20 L. J. (Ch.) 246.

(2) *Ib.*

(3) *Ib.*

(4) *Ib.*

(5) *Ib.*

25. Where a plaintiff, by virtue of a grant from the Crown made 36 Hen. 8, claimed, as lord of the manor of C., to be entitled to the beach or shore of the sea between high and low water mark, and the defendants, the surveyors of highways, had taken the stones to mend the highway of the parish; and upon a bill filed by the plaintiff against them the defendants put in their answer denying the right claimed by the plaintiff, and insisting upon their right to take the stones by custom, and also by prescription, and also under the Highways Act, 5 & 6 Will. 4, c. 50; upon a motion to dissolve an injunction obtained by the plaintiff, the Court held, that the rights claimed by the plaintiff were legal, and must be decided by an action, that the Court must consider which of the two parties was likely to sustain most injury, and that, notwithstanding the want of distinct evidence respecting injury, the Court, to prevent a possible mischief by alleged irreparable injury, would grant an injunction to restrain the taking the stones, considering that the plaintiff was most likely to suffer by its non-interference; and although the plaintiff's title was purely legal, and not clearly made out, it refused to put him on terms of bringing an action to try it, but merely gave him liberty to do so (1).

26. Where, after a railway company had purchased a piece of land from A., who was mentioned in the book of reference to be its owner, B. a neighbouring landowner, part of whose land the company had also taken, claimed to be the owner, and filed a bill for an injunction to restrain the company from continuing in possession of it and from committing waste on it; the Court refused with costs a motion for an injunction, on the ground that it was a mere case of adverse title claimed by the plaintiff, upon very slight evidence indeed, and without alleging that an action of ejectment or an action of trespass would not give all the remedy he could possibly be entitled to or wish for (2).

27. Where, in a suit by the lord of the manor against a tenant of lands within the manor to restrain the defendant from taking stone from lands in his occupation, the defendant, by his answer, alleged that it was and had been a common practice in the manor

(1) *Clowes v. Beck*, 13 Beav. 347; *way Company*, 1 Sim. (N. S.) 272; 6 20 L. J. (N. S.) (Ch.) 505. Rail. Ca. 698.

(2) *Webster v. South Eastern Rail-*

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to remove the stone which lay immediately under the surface for the benefit of cultivation, the Court, at the hearing, made a decree for a perpetual injunction, the defendant declining to try his right to take the stone in an action at law, to be brought against him by the plaintiff (1).

28. Where a possessory bill was filed in Ireland to restrain the defendant from cutting turf for sale, on the allegation that he was tenant to the plaintiff of land adjoining the bog, with a limited permission to cut turf for use in the bog, which plaintiff claimed as his own; on the affidavits shewing cause the tenancy of the land was admitted, but it appeared that the defendant and his predecessors had long claimed the disputed right over the bog, the plaintiff's title to which was vaguely stated; and in 1807 an injunction had been obtained in a similar suit, restraining the tenant from cutting turf at all; the Court held, that an injunction could not be obtained in this suit, as, if the tenant was a mere trespasser, it was not sustainable to establish a disputed right, there being no triennial possession, and the allegation of a limited permission could not be strengthened by the order of 1807, which set up a different claim (2).

29. Where, by an indenture of settlement, certain estates, consisting of a mansion-house and other premises, were limited to the use of trustees for a term of 1000 years without impeachment of waste, save only the cutting of ornamental timber, and subject to the said term to the use of the settlor for life without impeachment of waste, save as aforesaid, with divers limitations over; and the trusts of the term were, in the first place, by cutting and felling, and selling and converting into money all or any part or parts of the timber standing and growing on the said lands, which should be of full and ripe growth, and not ornamental to the mansion or pleasure-grounds attached thereto, or any of the views or prospects of the same, of which timber it was declared that enough of the most ornamental should always remain to preserve the beauty of the place unimpaired; or by demising, mortgaging, or selling the premises comprised in the said term, or any part or

(1) *Cuddon v. Morley*, 7 Hare, 202; (2) *Congleton v. Mitchell*, 12 Ir. Eq.
affirmed by the Lord Chancellor, Nov. Rep. 34.
24th, 1849.

parts thereof, save and except the mansion-house and certain other premises therein mentioned, or by all or any of the said ways and means, to levy and raise the sum of £10,000 for the settlor; and after the death of the settlor in like manner to levy and raise two sums of £10,000 each for other parties; the Court held, upon the equitable construction of the trusts of the term, that the trustees had a discretionary power to enter on the estates, and cut fit and proper timber, and apply the proceeds in discharge of the sums directed to be raised, and that the Court would protect them in the exercise of that power, there being an absence of all *mala fides*, or of any wanton or unreasonable exercise of their discretion (1); and an injunction was granted, at the suit of the trustees, restraining the tenant for life in possession from cutting the timber on the estates, on the ground that his doing so would interfere with the discretionary power vested in the trustees; and though exemption from liability to waste annexed to a life estate is a special power in the tenant for life to appropriate part of the inheritance, yet it was held that it was by the terms of the settlement made subordinate to the discretionary power conferred on the trustees (2).

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Tenant for life restrained interfering with the discretionary power (here) of the trustees to cut timber.

30. Where there were limitations of estates to successive tenants for life, with remainders in tail, subject to a term vested in trustees, the trusts of which were, in the first place, by cutting and selling timber of full growth then standing on the lands, or by demising, mortgaging, or selling the premises comprised in the term (except the mansion-house), for all or any part of the term, or by all or any of the said ways, or any other reasonable way, to raise £30,000, and pay the same to the parties therein mentioned; the trustees of the term being about to raise the whole of the charges by sale or mortgage of the premises comprised in the term, the parties beneficially interested in remainder in the estates filed their bill to restrain them from so doing till they had first applied the whole of the ripe timber upon the estates in reduction of the sums charged; to this bill demurrers were put in by the tenant for life of the premises, and by the trustees of the term, and the demurrers were allowed, the Court holding that the mode proposed by the trustees was the proper mode of raising the charge in question;

(1) *Kekewich v. Marker*, 3 Mac. & G. 311.

(2) *Ib.*

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for as between the tenants for life not impeachable for waste and the remaindermen, the *corpus* of the estate must bear the charge, and that the interest of the charge must be paid by the tenant for life in possession, who in the meantime was entitled (as part of the profits of the estate) to the timber, which, as such tenant for life, he had a right to cut; but the trustees of the term in such a case have not an unlimited discretion to raise the charge in such a manner as they may think fit; and it does not follow that because their discretion in the mode of raising the charge has been honestly exercised, the charge will be left to be finally borne by those parties upon whom their act might chance to throw it (1).

31. Where by indenture of settlement, dated in 1832, certain real estates were vested in trustees in fee, upon trust to keep down the interest on the incumbrances affecting the estates out of the rents, and by mortgages and sales to raise moneys towards the discharge of the principal, and subject thereto upon trust for the Earl of O. for life, with remainder in trust for his son, Lord H., for life without impeachment of waste, but subject to the power thereafter given to the trustees to fell timber, with remainder in trust for the first and other sons of Lord H. in tail male, with remainder in trust for the heirs and assigns of the Earl in fee; and power was then given to the trustees, at any time or times thereafter, so long as there should be any incumbrancer upon the estate (but, after the death of the Earl, not without the consent of the son, Lord H., if living, in writing) to fell timber upon the estates, and to apply the proceeds in discharge of the incumbrances; and after the death of the Earl the son claimed the right to fell timber and apply the proceeds for his own use; and a bill was thereupon filed by the trustees for a declaration of the true construction of the settlement, and for an injunction restraining the son from preventing the trustees from receiving the proceeds of timber felled with his consent, and also from felling timber; the Court, overruling a demurrer to the bill, held, that as the interference with the sale was by a *cestui que trust*, and not by a mere stranger, the proceeding was properly the subject of equitable jurisdiction, and that the timber growing upon the estate during

(1) *Marker v. Kekewich*, 8 Hare, 291.

the life of the defendant, the son, was to be applicable, not to his own purposes, but to relieve the inheritance from the incumbrances, and that the power to fell timber given to the trustees was not void as an infringement of the law against perpetuities (1); and, upon motion, an injunction was granted, it being held, upon the construction of the settlement, that the scheme of it was that the timber should be used to relieve the inheritance of the charges upon it, and that for this purpose the power given to the trustees was expressly made paramount to the privileges of the tenant for life without impeachment of waste to cut the timber, and that his consent was made necessary to enable him to regulate the mode of exercising the power (2).

32. The assignees of a bankrupt tenant for life have no right to cut ornamental timber, any more than the tenant for life himself; and if they do, the money proceeding from the sale will go to the first person entitled to the inheritance, and the assignees will be deprived of the income, even during the life of the tenant for life. The doctrine and principle of the interference of a Court of Equity, in the case of a tenant for life cutting timber, is, that no man shall obtain a benefit by his own wrong, and a tenant for life would do so if he were allowed the interest of the fund produced by the sale of the timber (3). The tenant for life may, however, gain a benefit indirectly, but not by reason of his own act, as in the case of timber thrown down by storm; the produce is laid out in the purchase of stock, and the interest of the fund is paid to successive tenants for life; and so of decaying timber (4). In this case an estate stood limited to A. for life without impeachment of waste, with remainder to his issue in tail, with a similar remainder to B. for life, with remainder to his issue in tail; and A. and B. became bankrupt, and the assignees under their joint commission committed equitable waste by cutting ornamental timber. The produce was brought into Court, and it was held, that the assignees were entitled to no part of the income, either in respect of the estate of A. or that of B., but

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Assignees of bankrupt tenant for life no right to cut ornamental timber — Sale moneys will go to first entitled to the inheritance, and assignees, no right to the income, the doctrine being — no man shall benefit by his own wrong.

Tenants for life are entitled to interest of moneys arising from timber blown down and from decaying timber.

(1) *Briggs v. Earl of Oxford*, 1 De G. M. & G. 363; 5 De G. & Sm. 156; 16 Jur. 53, 558.

(2) *Ib.*

(3) *Lushington v. Boldero*, 15 Beav. 1; 16 Jur. 140; *et v.* the note of Mr. Beavan to this case, 15 Beav. p. 9.

(4) *Ib.*

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that the whole produce and accumulation belonged to the eldest son of C., as first tenant in tail.

33. On a devise of a park to tenants for life, with successive remainders in tail, containing a proviso against mowing it, but no devise over in case of breach of the restriction, Vice-Chancellor Sir J. L. Knight Bruce granted an injunction against mowing, stating that he did so with great reluctance (1).

Parties defendants alone restrained committing waste—except as workmen or servants of defendants.

34. The Court will not grant an injunction to restrain waste against persons specifically who are not parties defendants to the bill, but they may be restrained as workmen or servants of the defendants, if they fill that character (2). Where a party filed a bill against his immediate tenant to restrain him from cutting turf for sale on a valuable bog appurtenant to the lands demised, and the tenant put in his answer, stating that he had never by himself been in the actual occupation of any portion of the lands, that he had never by himself or any of his agents committed the waste charged by the bill, and that if his sub-tenants had cut turf, for sale or otherwise, he was unable to restrain them from so doing, the practice having existed previously to the lands coming into his possession; the Court held, that though it did not appear whether these tenants were merely tenants from year to year, or had any greater interest, the injunction could not issue as they were not before the Court (3).

Tenant of farm restrained taking from a pool mineral substances, the right of the plaintiff having been established.

35. A perpetual injunction was granted to restrain the tenant of a farm, in part of which was a pool, through which ran a stream from the mountains, depositing in its passage mineral substances, from taking and carrying away from and out of the bed and bottom of the pool, or any part thereof, any soil, oxide of iron, ochre, slime, deposit, or other mineral substances; and from puddling, loosening, disturbing, and floating, and from causing to be puddled, loosened, disturbed, or floated off, any soil, oxide of iron, ochre, slime, deposits, or mineral substances already deposited, or thereafter to be deposited, upon the beds of the said pool, the right of the plaintiffs to the several mineral substances having been established by a verdict in an action at law brought by

. (1) *Blagrove v. Blagrove*, 1 De G & Sm. 252. (2) *Freeman v. Burke*, 7 Ir. Eq. Rep. 282.

(3) *Nurbury (Lord) v. Alleyne*, 1 D. & Wal. 337.

them against the defendant, and not in an issue or action directed by the Court (1).

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36. The Court will award a perpetual injunction to restrain waste by ploughing, burning, breaking, or sowing of down land (2). In *Goring v. Goring* (3) the Court refused an injunction to restrain a lessee from ploughing pasture lands which had remained unploughed, during the continuance of the lease, for thirty years, but had been ploughed within six years prior to its commencement; the Court (Lord Nottingham) holding that this circumstance prevented them from being ancient pastures within the rule of the Court usually granting an injunction to restrain the ploughing of meadows and ancient pastures, but an injunction was granted as to the meadows.

The Court restrains waste by ploughing, &c. down, meadows, and ancient pastures.

37. Where a lessee had covenanted not to dig up a particular part of the demised premises for raising sand, gravel, or brick-earth, and if the premises were dug for that purpose to pay the lessors £100 per acre; and he broke the covenant, and thereupon the lessor filed a bill for an injunction, and on affidavit of the waste committed an injunction was granted till answer and further order; and after the answer put in a motion was made to dissolve the injunction, and upon shewing cause the defendant consented to appear and plead to an action of debt or trover, and to take short notice of trial, and thereupon the injunction was dissolved; on appeal, the House of Lords discharged this order, and granted an injunction to continue till the hearing of the cause. The ground taken by the appellant was, that the £100 was a penalty, and that he was, therefore, entitled to relief (4).

Injunction against raising sand, &c., by lessee covenantor.

38. In Ireland, a lessee for lives renewable for ever will, unless under especial circumstances, be restrained from committing waste (5). In *White v. Walsh* (6) a lessee for lives renewable for ever was restrained from committing waste on the demised premises by cutting turf, although it appeared that the bog cut out was converted into pasture land, and that the ground was improved

Lessee for lives renewable for ever restrained committing waste—restrained cutting turves though ground improved—

(1) *Thomas v. Jones*, 1 Y. & C. Ch. 510; and see *Liaerai v. Johnson*, Ib. 527, n.

(3) 3 Sw. 661.

(2) *Worsley v. Stuart*, 4 Bro. P. C. 377.

(4) *City of London v. Pugh*, 4 Bro. P. C. 395.

(5) *Coppinger v. Gubbins*, 3 J. & L. 397; 9 Ir. Eq. Rep. 304.

(6) 1 Jones, 626, n.; *Anon.* Ib.

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and though
immemorially
cut;
but not re-
strained cut-
ting as fire-
bote.

When turf
may be cut for
sale.

Lessee for
lives renew-
able for ever
restrained
cutting timber
if large arrears
of rent.

by the waste; and a lessee for years renewable for ever will be restrained from similar waste, although it appear that the tenant had immemorially cut turf (1). But in *Count de Salis v. —* (2) the Court refused an injunction to restrain a tenant from cutting turf as fire-bote; however, in *Lord Courtown v. Ward* (3) the Court restrained a tenant from cutting turf for sale (his lease giving a right of estovers only) notwithstanding an uninterrupted practice for eighty years. But a mere demise of bog as such will not give the lessee the right to cut turf for sale, particularly where the demise is of the bog with other property. But if nothing but bog be demised, and it is not convertible for any other use save being cut for sale, or if it were at the time of the demise used by cutting it for sale, the lessee may cut turf for sale (4). And where tenant in fee, in possession of lands, conveyed the same and all bogs thereon to a purchaser, who, by deed of equal date, demised the lands to the vendor and his heirs for lives, renewable for ever, to hold "in the same manner as he now holds and enjoys the same," reserving a rent equal to £6 per cent. on the purchase-money, and the lease contained the ordinary powers and covenants, and the vendor had, in some few instances before the conveyance, cut turf for sale; the Court, nevertheless, being of opinion that there was no such general dedication of the bog to cutting for the mere purpose of sale as to convert it into the nature of an open mine, held, that the lessee was not entitled to cut turf for sale (5). And a lessee for lives renewable for ever will be enjoined from committing waste by cutting timber if he allow a large arrear of rent to become due (6). But in *Conolly v. Eley* (Lord) (7) Lord Chancellor Manners would not restrain a tenant for lives with a covenant for perpetual renewal from cutting timber, though it did not appear when planted, but ordered that the defendant should keep an account of the produce, with liberty to the plaintiffs to proceed at Law.

(1) *Waterpark (Lord) v. Austen*, 1 Jones, 627, n.; *Purcell v. Walsh*, Ib. 625.

(2) 2 Moll. 516.

(3) 1 Sch. & Lef. 8.

(4) *Coppinger v. Gubbins*, 3 J. & Lat. 397; 9 Ir. Eq. Rep. 304.

(5) Ib.

(6) *White v. Nowlan*, 1 Hog. 21; *S. P. Pim v. Davies*, 1 Hog. 11.

(7) 2 Moll. 515; *S. P. Percy v. Shanly*, Ib.; and *Montgomery v. Cunningham*, Ib. 536; *sed secus* if for sale, *Bouchier v. O'Grady*, Ib. 536.

39. The Court will restrain waste, although the act done may lead to the improvement of the land, if it immediately occasion any damage to the inheritance; and the Court will not refuse to restrain waste by which the estate is not necessarily and permanently improved, on the mere ground that the party has done other acts which will benefit the estate; therefore, an injunction to restrain cutting turf will not be refused on the ground that the tenant has converted the cut-out bog into arable land (1); but, *quære*, whether the Court will, in such a case (namely, a lease for lives renewable for ever) restrain mere acts of meliorating waste by the lessee for lives (2).

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Meliorating waste restrained where damage to the inheritance.

40. Where the plaintiff in the cause had obtained an order for a receiver, and was proceeding to cut timber upon the estates before the receiver had been appointed, the Court refused to grant an injunction upon the application of the defendant, it appearing that the latter, who was the agent of the owner of the estates (also a defendant) had no interest in such estates, and no authority from his principal to make the application (3).

Injunction refused on application of a mere agent without authority to apply.

41. In *Morris v. Morris* (4) ornamental timber was protected by an injunction though the mansion-house had been pulled down, and the bill did not complain of that act. Vice-Chancellor Sir L. Shadwell said that he thought the power in the settlement to demise to persons who should be willing to build or to repair houses tended to sustain the right of those in remainder to have the trees preserved which were originally planted for shelter and ornament; because though the mansion-house which the trees were intended to shelter and ornament no longer existed, yet there was a possibility of leases being made for the purpose of building houses, which might receive a benefit from the ornament or the shelter afforded by the trees; and that, in that respect, it was something like the case of *Wellesley v. Wellesley* (5).

Ornamental timber protected (here) though mansion-house pulled down.

42. Where after a decree in a foreclosure suit, a mortgagor in possession began to commit waste, he was restrained by injunction, though no injunction was prayed by the bill (6).

After decree in foreclosure — mortgagor restrained committing waste.

(1) *Coppinger v. Gubbins*, 3 J. & Lat. 397; 9 Ir. Eq. Rep. 304; *Leeds (Duke) v. Amherst*, 2 Ph. 122.

(N. S.) Ch. 320.

(2) *Ib.*; *v. post*, pl. 110.

(4) 15 Sim. 505; *v. Wellesley v. Wellesley*, 6 Sim. 497.

(5) *Supra*.

(3) *Hunter v. Nockolds*, 15 L. J.

(6) *Goodman v. Kine*, 8 Beav. 379.

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A receiver
may obtain
without bill
injunction to
restrain
tenants from
waste.

43. The Court will, upon motion by the receiver, grant a conditional order to restrain tenants under the Court from committing waste without a bill being filed for the purpose (1).

44. In *Viner v. Vaughan* (2) the Court granted an injunction against a tenant for life simply (who is therefore impeachable of waste) who had contracted for excavating clay for making bricks. A tenant for life has no right to take the substance of the estate by opening mines or clay pits; but where the author of the settlement or gift has previously worked them, the tenant for life has a right to continue the working of them, and for this reason, that the author of the gift has made them part of the profits of the land; but it does not follow that the tenant for life has a right to open old abandoned pits, or to commence opening any mines or pits which the author of the gift has merely made preparations for opening; and the defendant was restrained from taking away the substance of the estate before the question had been tried, namely, whether the pits were in such a state as to enable the tenant for life to work them.

The Court will
restrain waste
by collusion.

45. Where a bill by the person next in remainder charged that the tenant for life, who was punishable of waste, and who had power to make leases not punishable of waste, had demised a part of the lands to a third person, and that such person, in collusion with the tenant for life, was committing waste by turning up, tilling, and burning the land; and the defendant admitted the turning up, &c., but stated it was land which the tenant for life had reclaimed and laid down in grass thirty years before; *semble*, that such pasture is not ancient meadow (3). But as to the point of collusion, the Court will interfere if the tenant for life and the remainderman in fee, subject to contingent estates, are committing waste in collusion (4), or where waste is being committed by a tenant for life in possession, who has the next vested estate of inheritance in remainder, but subject to intermediate contingent estates (5).

(1) *Cronin v. M'Carthy*, Fl. & K. Rep. 414.

49.

(2) 2 Beav. 466; affirmed by the Lord Chancellor, June 9, 1840.

(3) *Davies v. Davies*, 2 Ir. Eq.

(4) *Garth v. Cotton*, 1 Dick. 183; 1 Ves. Sen. 524, 548; 3 Atk. 751.

(5) *Williams v. Bolton* (Duke of),

1 Cox, 72.

46. A tenant will not be allowed to break up ancient meadow or pasture, though the land is mossy and requires tillage (1).

47. Where the relation of landlord and tenant existed between the parties, the Court has sometimes interfered by injunction to restrain waste, though the *locus in quo*, being the property of the landlord, was not any part of the demised premises; but where such relation does not exist, the Court will not interfere. Therefore where waste on the demised premises was commenced during the tenancy, and continued after the tenancy had determined, by persons claiming under the late tenant, the Court, after the determination of the tenancy, refused to grant an injunction (2).

Where relation of landlord and tenant exists, waste sometimes restrained, though *locus*, &c., not demised—but (in cases of that character) no interference where that relation does not exist.

48. Where a lessee in Ireland had covenanted not to sub-let without consent in writing, or that he should forfeit and pay the additional rent of £50 per annum, “and also not to cut more turf than should be sufficient for the consumption of himself, his executors, administrators, and assigns on the demised premises without consent in writing,” or that he, &c., should forfeit and pay the additional rent of £10 for every acre which should be cut or made into turf; and the representative of the lessee sub-let without consent, and the additional rent of £50 had been regularly paid and received ever since; and the representatives of the lessor having filed a bill against the representatives of the lessee, and the several under-tenants for an account, and for an injunction in the nature of a writ of estrepement (3), then moved that the defendants might be restrained from selling turf off the demised premises, and from burning turf for manure, and from cutting the reclaimed meadow land into turf, and from cutting more turf than allowed by the original lease, being only a sufficiency for the use of one family; the Court granted an injunction until the hearing to restrain the selling of turf and burning for manure, and also cutting the reclaimed meadow land; but on the motion refused to restrain the under-tenants from cutting turf sufficient for their own consumption on the premises, the Court observing that there would be a serious question on the hearing of the cause (4).

(1) *Martin v. Coggan*, 1 Hog. 120.

(2) *Wrixon v. Condran*, 1 Ir. Eq. Rep. 380.

(3) A common law writ giving a preventive remedy for the injury of

waste; the common law writ of *waste* giving a corrective remedy, (*v.* 3 Bl. Com. 225, 6, 7.)

(4) *Macwell v. Mitchell*, 1 Ir. Eq. R. 359.

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No injunction
in nature of
estrepement
unless title
clear.

None against
tenant with
covenant for
perpetual
renewal.

When a sum
is disproportioned to the
damage, it is a
penalty and
relieved
against.

No injunction
to restrain
breaking up
ancient mea-
dows and pas-
ture—tenant
having given
notice that he
wanted the
lands as a
tillage farm.

49. The Court in Ireland will not entertain a motion for an injunction in the nature of a writ of estrepement to restrain waste, except where the title is clear (1). But an injunction in the nature of a writ of estrepement of waste does not lie against a tenant holding under a lease containing a covenant for perpetual renewal (2).

50. Where a lease contained a covenant against ploughing or digging up any part of the demised premises, and in case the lessee should do so, that he should pay the sum of £5 for every cart of clay or sand which he should so dig up, and also £5 in addition to the rent for every acre, so long as any part thereof should continue to be broken or ploughed up; the Court held, that the sum mentioned in the covenant being disproportioned to the damage contemplated was in the nature of a penalty, and not of liquidated damages, and that the Court could interfere to restrain by injunction the lessee from violating the covenant (3). But it appearing that the lessee had been appointed by the grand jury of the county of Dublin as overseer of certain roads in the county, under the 26 Geo. 3, c. 14, and had made tenders for the repair of certain of those roads with gravel and stones, to be taken from the demised premises, which tenders the grand jury had accepted, and passed presentments accordingly; the Court would not interfere to restrain the lessee so far as he acted under the authority of their Act (4).

51. Where the plaintiffs filed a bill for an injunction to restrain the defendant, their tenant, from breaking up ancient meadow and pasture land (waiving penalties), and prayed compensation for the waste already done, and it appeared that when the defendant proposed to take the lands he apprised the plaintiffs that he wanted them for a tillage farm; and it also appeared that when the draft lease prepared by the plaintiffs' attorney was read in the presence of plaintiffs and the defendant, it contained a clause restraining tillage within certain limits, and the defendant having refused to agree thereto, the plaintiffs consented that it should be struck out, and the lease accordingly did not contain any clause

(1) *Lowe v. Lucy*, 1 Ir. Eq. Rep. 93.

(3) *Burne v. Madden*, Ll. & G. temp.

(2) *Calvert v. Gason*, 2 Sch. & Lef. Plunk. 493.

561.

(4) *Ib.*

respecting tillage; the Court refused an injunction, but the plaintiffs to proceed at Law as they might be advised (1).

52. The Court will not interfere to restrain the waste of a sub-tenant at the instance of his immediate landlord, if it appear that the latter has obtained an indemnity against the claims of the head landlord (2).

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No interference against sub-tenant if his landlord has an indemnity against the superior lord.

53. Where A., holding meadow and pasture lands under a lease of lives renewable for ever, demised a part of the premises to B. for a similar term, with a covenant to keep and deliver up the premises in tenantable order, &c., and with a power of surrender at the end of every three years; the assignees of B.'s interest being about to convert the premises into a public cemetery, the representatives of A. obtained an injunction to prevent them; and *semble*, the proposed alteration of the property would amount to waste at Common Law (3).

Assignees of a sub-lessee of meadow and pasture land for a term for lives renewable for ever, restrained converting premises into a cemetery. *Semble*, this would be waste.

54. The Court will grant an injunction to stay waste of trees for ornament, or belonging to a mansion-house (4). Where a mansion-house, park, and pleasure-grounds, with certain villas on the estate, were limited in strict settlement, and the trustees were empowered to grant building leases of the settled estates, and, at the request of the tenant for life, to pull down the mansion-house, sell the materials, and apply the proceeds in paying off incumbrances on the estates, and the house was accordingly pulled down, the tenant for life unimpeachable of waste was, notwithstanding the mansion-house had been pulled down, afterwards restrained from felling the ornamental timber in the park and grounds. The Vice-Chancellor Sir L. Shadwell said, that timber need not necessarily be ornamental to the house, for the Court protects trees even if they are out of sight of the house (5). And a tenant for life without impeachment will be restrained from cutting timber planted or left standing for ornament, &c., whether ornamental or not so, and the principle has been extended beyond the mansion-house to out-houses and grounds, plantations, vistas, avenues, and all the rides about the estate for ten miles round (6).

The Court protects trees even if out of sight of the house.

(1) *Shew v. Weir*, 1 Ir. Eq. Rep. 213.

(2) *Keogh v. Collins*, Hay & J. 805.

(3) *Hunt v. Brown*, Sau. & Sc. 179.

(4) *Garth v. Cotton*, 3 Atk. 751, 756.

(5) *Wellesley v. Wellesley*, 6 Sim. 497.

(6) *Downshire (Marquis of) v. Sandys* 6 Ves. 107, 110.

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Trees to ex-
clude objects
are within
doctrine of
equitable
waste.

Extended to
clumps of firs
two miles
from house.

Trees for
shelter of
mansion—
trees forming
avenues—
ridings in
parks—within
the doctrine,
and whether
planted or
growing
naturally.

Though—as
between lessor
and lessee—a
lease permit-
ting waste is
good, yet the
Court will pre-
vent waste if
it injure a
security.

55. The Court extends its jurisdiction granting an injunction against cutting ornamental timber, upon the principle of equitable waste, to trees planted for the purpose of excluding objects from view (1). Lord Chancellor Eldon, in *Downshire v. Sandys* (2), extended an injunction restraining a tenant for life without impeachment of waste from cutting timber growing for ornament or shelter to clumps of firs on a common two miles from house, having been planted for ornament. The Court will restrain a tenant for life without impeachment of waste from cutting down timber trees which were for the shelter or ornament of the mansion-house, and any timber trees planted or growing in lines, avenues, or ridings in a park; and whether trees grow naturally, or whether planted, if they serve for ornament or shelter, it is the same thing (3).

56. Where R. N., by his will, devised to F. N., and his assigns, for life, all his real estates in W., without impeachment of waste, except the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage called A., remainder in trust for C. N. N. for life, remainder to his first and other sons in tail male; the Court held, that the restriction as to cutting timber was confined to the premises specified in the exception clause, and ought not to extend to the woods adjoining to the excepted parts, nor to the avenues made by the testator in those woods; and that no proceedings for equitable waste could be maintained as to trees planted, &c., for ornaments, &c., as to a house which had formerly been a principal mansion, and having gone into decay had been restored by F. N., the tenant for life (4). And the mere fact that the devisor or settlor may have thought that the house might possibly be rebuilt is not enough to make the timber ornamental timber (5).

57. Although a bill may be dismissed so far as it seeks to set aside a lease made to a defendant which permitted waste, and which is a good lease as against the lessor, yet it is within the province of the Court, while money due, under a settlement to

(1) *Day v. Merry*, 16 Ves. 375.

(2) 6 Ves. 107.

(3) *Packington's Case*, 3 Atk. 215

(there appears, upon the point of waste, to be no report of *Charlton v. Charlton*, cited by the Lord Chancellor).

(4) *Newdigate v. Newdigate*, 6 Bli. (N. S.) 734; 2 Cl. & F. 601.

(5) *Newdigate v. Newdigate*, 8 Bli. (N. S.) 734; *Micklethwait v. Micklethwait*, 1 D. & J. 504, 527.

the plaintiff, remains unpaid, to prevent any waste which may tend to injure the security (1).

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58. In *Fingal (Earl) v. Blake* (2) an injunction against cutting timber was granted, although the will was not established, and the title was disputed as between the devisee and heir-at-law. In this case the Lord Chancellor Hart, on a rehearing, reversed an order refusing an injunction to stay waste at the suit of the devisee in trust against the heir-at-law in possession, who disputed the will, which order had been affirmed, on appeal, by Lord Chancellor Manners, the Court below and the Lord Chancellor Manners considering the law of the Court as settled in cases between heir-at-law and devisee not to grant an injunction against the defendant who impeaches the plaintiff's title. But in *Beatty v. Beatty* (3) an injunction was refused against felling timber, at the suit of a devisee, against the heir-at-law in possession admitting the waste, but disputing the will, on the ground that the denial of the title of the devisees, and the assertion of the title as heir, made him, if he had no right, a mere trespasser.

Injunction to stay waste at suit of devisee against heir in possession.

59. The Court will not grant an injunction to stay waste at the instance of a judgment creditor in a suit by him against a party who is heir-at-law and administrator of the debtor, unless there be an affidavit that the debt is in danger of being lost by the acts of waste being permitted (4).

No injunction to stay waste granted to judgment creditor against heir and administrator of debtor, unless by the waste.

evidence that debt in danger of being lost

60. An injunction may be obtained upon motion to restrain a purchaser, under a decree, not a party to the cause, who has not paid the purchase-money, from committing waste on the property purchased (5).

Purchaser under decree owing purchase-money—restrained upon motion.

committing waste, though not a party, and

61. An injunction against committing waste will not be granted against a mortgagee, even though he make no affidavit denying the waste, if it appear by the affidavit of the actual occupier of the land that the alleged waste is not committed by the mortgagee, or by his authority (6).

62. On a mortgage of wood and underwood it is not waste by mortgagee of wood and underwood not restrained cutting underwood seasonably—but mortgagee entitled to injunction if mortgagee becomes bankrupt.

(1) *Turkington v. Kearman*, L.L. & G. temp. Sugd. 85.

(2) 2 Moll. 50, 542.

(3) 2 Moll. 541.

(4) *Leake v. Beckett*, 1 Y. & J. 339.

(5) *Casamajor v. Stride*, 1 S. & S. 381.

(6) *Anon.*, 1 L. J. (Ch.) 119.

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the mortgagor in possession to cut underwood at seasonable times and of proper growth; but being a bankrupt, an injunction was granted on the right of the mortgagee to have the estate sold in the plight in which it was at the bankruptcy, and to prove the rest of his debt (1).

63. The Court will restrain cutting underwood of insufficient growth (2).

No injunction
if waste doubtful.

64. An injunction to stay waste will not be granted where it is doubtful whether the acts complained of are waste; and, under the late practice, the plaintiff was obliged, first, to try the question of waste or no waste at Law; but now, under the recent changes in the practice, the question of waste or no waste can be tried or decided in Equity (3).

65. In *Attorney-General v. Marlborough (Duke of)* (4), where an injunction to stay waste had been granted on petition, a reference was made to inquire what timber, &c., might be cut advantageously.

If waste trivial
no injunction.

66. In *Barry v. Barry* (5) the Court refused an injunction to stay waste, on the ground that the acts of waste committed were trivial, and also that the plaintiff's proceedings had been dilatory; but Lord Chancellor Eldon said that he admitted that a small degree of waste (he did not say the smallest), manifesting an attempt to do more, would be sufficient for the Court to act upon; but that it would look at it in the manner in which the subject was viewed by the Courts of Law, and there the extent of the waste done was considered very material; and that there was an authority at Law where, a verdict having been found for the plaintiff, judgment was entered up for the defendant on account of the extreme smallness of the damages (6); and that a Court of Equity would, in this, follow the Law.

67. In *Pratt v. Brett* (7) the Court granted an injunction to stay waste, and from sowing land with pernicious crops.

Tenant for
years re-
strained.

68. An injunction will be granted against waste by a tenant for years (8). In *Onslow v. —* (9) the Court granted an injunction to restrain a tenant from year to year under notice to quit, as

(1) *Hampton v. Hodges*, 8 Ves. 105.

(5) 1 Jac. & W. 651.

(2) *Brydges v. Stephens*, 6 Madd.

(6) *Harrow School v. Alderton*, 2 B. & P. 86.

279.

(3) *Lyon v. Wilkinson*, 1 L. J. (Ch.)

(7) 2 Madd. 62.

155 (v. 25 & 26 Vict. c. 42, Rolt's Act).

(8) *Kimpton v. Eve*, 2 V. & B. 349.

(4) 5 Madd. 280.

(9) 16 Ves. 173.

in the case of a lessee for a longer term, from doing damages, and from removing the crops, manure, &c., except according to the custom of the country. In *Twort v. Twort* (1) an injunction was granted against waste between tenants in common, on the ground that one was occupying tenant to the other, but otherwise there is no injunction between tenants in common, except as to positive and actual destruction (2). And in *Smallman v. Onions* (3) an injunction to stay waste was refused where the plaintiff and defendant in possession were tenants in common, but granted on an affidavit of the defendant's insolvency and that he was unable to pay his co-tenants their shares of the money produced by the sale of the timber cut. But the Court will not grant an injunction between tenants in common against pure equitable waste (4).

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Tenant from year to year restrained from removing crops, &c., except according to custom.

No injunction by tenants in common against each other unless destruction or occupancy as tenant, or insolvency;

but no injunction against waste.

69. An injunction will be granted against waste by destruction of a dove-cote, but not by removing presses *eo nomine*, if not fixed to the freehold, in which case it would be waste (5).

pure equitable

Destruction of dove-cote, restrained, and removing presses, if fixed to freehold.

70. Where there is an executory devise over, even of a legal estate, this Court will not permit timber to be cut, more especially in the case of a trust estate; and in *Stansfield v. Habergham* (6), Lord Chancellor Eldon restrained the heir, who was entitled by way of resulting trust, until the determination of an event, upon which the future contingent estates were to arise, from cutting timber.

Where executory devise, whether legal or equitable, cutting timber restrained.

71. The Court will not grant an injunction to stay waste without positive evidence of title (7).

Waste not restrained without positive evidence of title.

72. Lord Chancellor Eldon, in *Davis v. Leo* (8), said that he had no doubt a tenant for life might have an injunction, particularly as to ornamental timber, for that that was not so much upon his interest as his enjoyment.

73. In *Williams v. M'Namara* (9), Lord Eldon, on the ground that the orders in such cases did not contain any such words, refused to extend, by inserting the words "contribute to ornament," an injunction against cutting ornamental timber; and the

The injunction as to ornamental timber not extended to "contribute to ornament."

(1) 16 Ves. 128.

(2) *Twort v. Twort*, *supra*; *Hole v. Thomas*, 7 Ves. 589.

(3) 3 Bro. C. C. 621.

(4) *Hole v. Thomas*, *supra*.

(5) *Kimpton v. Eve*, 2 V. & B. 349.

(6) 10 Ves. 273.

(7) *Davis v. Leo*, 6 Ves. 784.

(8) *Supra*.

(9) 8 Ves. 70.

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Timber
planted for
ornament,
whether orna-
mental or not,
is protected.

order was taken in the terms, "standing for ornament or shelter." In *Coffin v. Coffin* (1) Lord Eldon said: "The Court does not protect timber because it is ornamental, but it protects it if it was planted for ornament, whether it is or is not ornamental." Where equitable waste of one kind only has been done or threatened, the injunction is not to be extended to equitable waste of other kinds (2). But the Lord Chancellor refused to extend the usual injunction in cases of equitable waste, to trees which protected the premises from the effects of the sea (3). In *Tamworth (Lord) v. Ferrers (Lord)* (4) the Court granted an injunction to restrain tenant for life without impeachment from cutting timber or other trees planted or growing for shelter or ornament, and from cutting, except in a husbandlike manner.

Waste re-
strained gene-
rally, if one
act of waste.
Small degree
of waste suffi-
cient if intent
manifested to
do more.

74. In equitable, as in legal, waste, if one act of waste be established, the Court will restrain equitable waste generally (5). And a small degree of waste manifesting an intent to do more is sufficient for the Court to act upon (6).

75. In cases of waste it is the business of the reversioner to apply to the Court promptly (7).

Tenant
making de-
fault in eject-
ment, re-
strained com-
mitting wilful
waste.

76. Where a tenant defending an ejectment brought by his landlord, makes default at the trial, and makes use of the interval to do all the mischief he can by breaches of covenant and wilful waste, an injunction will be granted on motion, or, in the vacation, on petition; but it was refused where no ejectment had been brought (8).

Vendor
(tenant for
life) liable for
waste, cannot
prevent
vendee from
cutting
timber.

77. If a tenant for life liable to waste sell timber, he cannot prevent the vendee from cutting it (9).

78. Where the Court had granted an injunction from further digging a ditch, the Court would not order it to be filled up till after answer (10).

Removal of
timber cut,
restrained.

79. In an *Anonymous Case* (11) the Court made an order to prevent the removal of timber wrongfully cut.

Widow of
deceased
rector re-
strained com-
mitting waste.

80. In *Hoskins v. Featherstone* (12) the Court granted an injunc-

(1) Jac. 70, 71.

(7) Ib.

(2) Ib.

(8) *Lathropp v. Marsh*, 5 Ves. 259.

(3) Ib.

(9) *Wentworth v. Turner*, 3 Ves. 3.

(4) 6 Ves. 419.

(10) *Anon.* 1 Ves. Jun. 140.

(5) *Coffin v. Coffin*, 6 Madd. 117.

(11) 1 Ves. Jun. 93.

(6) *Barry v. Barry*, 1 Jac. & W. 651.

(12) 2 Bro. C. C. 552.

tion to stay waste against the widow of a rector, at the suit of the patroness, during vacancy. The patron of a living may have an injunction against the incumbent to stay waste; so may the Attorney-General against a bishop; but they cannot pray any account of the profits for their own benefit as patrons (1).

81. Where there was a lessee for years sans waste, remainder in fee to a bishop, the Court restrained the lessee from digging the ground for brick earth (2). The Court, in *Acland v. Attwell* (3), at the suit of the patron, granted a writ of prohibition and assistance to the sheriff to prevent a prebendary from committing waste and spoil upon the houses, lands, woods, and timber trees on his prebend. So, waste by a bishop is the subject of prohibition, and can be restrained (4).

82. The Court, in *Bishop of Winchester v. Wolgar* (5), granted an injunction to restrain the lessee for years of the temporalities of a bishop, under a lease confirmed by the dean and chapter, and without impeachment of waste, from felling timber (6). If tenant for life by demise of a bishop's predecessor commit waste during the vacancy, the successor shall have an action for it. And this action is not given by the Statute of Marlbridge—if it were so, he might sue for waste done in the time of his predecessor, which he cannot do—but this remedy is by the policy of the law (7).

83. A rector may cut down timber for the repairs of the parsonage house or chancel, but not for any common purpose (8), and is entitled to botes for repairing barns and outhouses belonging to the parsonage (9); and in respect to waste a parson or vicar is not to be considered as merely lessee for years, or as tenant for life under a will or settlement; and the Court will not restrain an incumbent from ploughing up meadow infested with moss and weeds for the purpose of laying it down again in grass when properly cleaned, on the ground that a law to prevent the amelioration of glebe lands by such means would probably be very injurious

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Att.-Gen. may obtain an injunction to stay waste against a bishop.

Writ of prohibition against prebendary to prevent waste of houses, lands, &c.

So, of a bishop.

Lessee for years without impeachment, &c., of temporalities of bishopric restrained.

Lessee of a bishop for life committing waste during vacancy can be sued at Law by the successor.

Rector may cut down timber for repairs of parsonage or chancel—is entitled to botes for repairing barns, &c.

Court will not restrain incumbent ploughing up meadow infested with moss, &c., to lay down in grass.

(1) *Knight v. Mosely*, Amb. 176.

(5) *Ante*.

(2) *Bishop of London v. Webb*, 1 P. Wms. 527.

(6) *Ib*.

(3) 3 Sw. 499.

(7) *Garth v. Cotton*, 3 Atk. 751, 755.

(4) *Bishop of Winchester v. Wolgar*,

(8) *Strachy v. Francis*, 2 Atk. 217.

3 Sw. 493.

(9) *Ib*.

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It is not a general proposition that conversion of ancient pasture is waste.

Injuring fish-ponds may be restrained.

Building so as to stop a prospect not a nuisance at Common Law.

Injunction refused (here), plaintiff's right being doubtful.

Injunctions can be obtained before actual waste, if threatened, or right to commit it, insisted upon.

to the persons who are, successively, from time to time, to enjoy the possession of such lands; and the Master of the Rolls (Lord Langdale) seemed to doubt in what case a patron was entitled to an injunction to restrain the incumbent from ploughing up ancient meadows (1); and he said that it could not be decided as a general proposition, without any exception, that the conversion of ancient meadow into pasture is to be treated as waste (2).

84. In *Bathurst v. Burden* (3) Lord Thurlow overruled a demurrer to a bill for an injunction to restrain injuring fish-ponds; and he also, in this case, restrained a tenant from building so as to interrupt his landlord's prospect. However, in *Attorney-General v. Doughty* (4), Lord Chancellor Hardwicke refused an injunction to stop proceeding with buildings which would intercept a prospect from Gray's Inn Gardens, before an answer which might set up a particular right, as an agreement of the parties, but said he knew of no general rule of Common Law which said that building so as to stop another's prospect was a nuisance.

85. In *Field v. Jackson* (5) Lord Chancellor Thurlow refused an injunction for waste on the ground that the plaintiff's right was doubtful, observing that the case arose upon the construction of an Act of Parliament which was doubtful, whether the defendants had a right to make a cut through grounds in the nature of waste complained of.

86. Although in an *Anonymous Case* (6) it is said the injunction must be prayed against present waste, yet there is no doubt the Court has jurisdiction, if a case of prospective injury is made out, to issue an injunction before waste has actually been committed; and in *Gibson v. Smith* (7) it was held by Lord Chancellor Hardwicke that if a person has only threatened to open mines, a plaintiff may certainly come into this Court to restrain a defendant from doing it, and that it is not necessary to stay till waste is actually committed, where the intention appears, and the person insists on

(1) *St. Alban's (Duke) v. Skipwith* Case, 9 Rep. 58 a.; *Webb v. Bird*, 10 C. B. (N. S.) 276.

(2) *Ib.* (5) Dick. 599.

(3) 2 Bro. C. C. 64. (6) Loft. 151.

(4) 2 Ves. Sen. 453; and see *Fishmongers' Company v. East India Company*, 1 Dick. 165; and see also *Aldred's* (7) 2 Atk. 182; *et v. North Eastern Railw. Co. v. Elliott* 1. J. & H. 145; 2 De G. F. & J. 423; 10 H. L. C. 33.

his right to do it; and though no proof appears of waste, yet if a tenant for life insists on a right to do it, and has none, the reversioner may have an injunction.

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87. The Court will grant an injunction against cutting down saplings, wavers, and fruit trees (1), and hedges, except trees or shrubs that may be removed in the ordinary business of a nurseryman (2). And in *O'Brien v. O'Brien* (3) the Court granted an injunction to stay a tenant for life from committing waste by cutting trees growing for ornament, and saplings not proper to be felled; and the Court will restrain tenants for life, without impeachment of waste, to a reasonable exercise of the right (4).

Cutting down
saplings, fruit
trees, and
hedges,
restrained.

88. The Court will restrain waste in an under-lessee at the suit of the ground landlord. So, against a first tenant for life, at the suit of the remainderman, notwithstanding an intermediate life estate; so, against a mortgagee (not applying the produce of timber in sinking the principal and interest) at the suit of the mortgagor; so, against a mortgagor committing waste to the prejudice of the mortgagee (5).

89. In *Piers v. Piers* (6) Lord Chancellor Hardwicke refused an injunction to restrain the father, who was tenant for life without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, and turning meadow into plough land; to ground such an injunction there must be destruction and spoliation, and Lord Hardwicke said it was not an immaterial circumstance for the defendant that an injunction had never been applied for, which was always done in such a bill.

90. In *Hughes v. Trustees of Morden College* (7) Lord Hardwicke held, that garden grounds used for trades were as much protected by the exceptions in the Highway and Turnpike Acts as private or house-gardens, and the plaintiff was therefore quieted in possession by an injunction against the commissioners, who had entered and dug gravel under an agreement with the trustees of

(1) *Kaye v. Banks*, Dick. 431; *Hole v. Thomas*, 7 Ves. 589.

(2) *Little v. Thompson*, 2 Beav. 129; *Pentland v. Somerville*, 2 Ir. Ch. Rep. 289.

(3) Amb. 107; 1 Bro. C. C. 168, n.

(4) *Aston v. Aston*, 1 Ves. Sen. 264.

(5) *Furrant v. Lovel*, 3 Atk. 723.

(6) 1 Ves. Sen. 521.

(7) 1 Ves. Sen. 188; and *Belt's* Sup. 109.

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An admission that waste had been committed before filing bill entitles to injunction.

Cutting down decayed timber is waste.

A person having no interest was restrained before answer.

Waste restrained in favour of infant *in ventre*, &c.

No injunction against tenant not a party.

the college, on the land of the plaintiff, to whom the trustees had granted a lease for twenty-one years.

91. If a defendant, by his answer, admitted that he had committed waste before the filing of the bill, though he swore that he had committed none since, yet the Court, under the old practice, would not dissolve the injunction, for the Court, upon that admission, would presume that he might do further waste (1).

92. The cutting down decayed timber is as much waste as cutting down any other (2).

93. Under the old practice an injunction was granted before answer to stay waste, by a person having no interest in the thing wasted, but merely acting as a servant (3).

94. The Court will grant an injunction to stay waste in favour of an infant *in ventre sa mère* (4).

95. The Court, in *Attorney-General v. Ancaster (Duke)* (5), granted an injunction to stay waste against a tenant in possession not a party. But, in *Hodson v. Coppard* (6), where the defendant had had property conveyed to him in fee, with a restriction, by way of use, against carrying on certain trades on the property, and the defendant's tenants carried on such trade; upon a bill by the grantors against the defendant (the grantee) alone, for an injunction, upon which he insisted on his right to carry on the trade, the Master of the Rolls (Lord Romilly) granted a perpetual injunction against the defendant, his servants and agents, but declined extending it to his tenants, being of opinion that he could not grant an injunction against the defendant *and* his tenants.

96. In *Vane v. Barnard (Lord)* (7) (the *Raby Castle Case*) the Court granted an injunction to prevent a tenant for life dispossessable for waste from pulling down a castle, and also ordered that the castle should be repaired at the expense of the defendant, the tenant for life, who had collected 200 men and stripped the castle of iron, lead, doors, &c. In this case the defendant, A., on the

(1) *Anon.*, 3 Atk. 485.

(2) *Perrot v. Perrot*, 3 Atk. 95.

(3) *Orrery (Lord) v. Newton*, Ridg.

252.

(4) *Wallis v. Hodson*, 2 Atk. 117;

Robinson v. Litton, 3 Atk. 211; *Mus-*

grave v. Parry, 2 Vern. 710; *Lutterel's Case*, cited in *Hale v. Hale*, Prec. Ch. 50.

(5) Dick. 68.

(6) 29 Beav. 4.

(7) 1 Salk. 161; 2 Vern. 738; Prec. Ch. 454; Gilbert Eq. Rep. 127.

marriage of his son, had settled (*inter alia*) the castle on himself for life, sans waste, remainder to his son, the plaintiff; and the Court held, that the father, though his estate was sans waste, could not pull down the castle, nor commit any voluntary waste therein.

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97. In *Dayrell v. Champneys* (1) the Court granted an injunction to stay waste in cutting trees, on a bill by a party who was only tenant for life and had no right to the trees, and though a party entitled to the inheritance was not joined.

98. The Court will grant an injunction to stay waste against a jointress (2). But where it was covenanted that the jointure should be of a certain value, which it was not, the Court refused the injunction (3).

Jointress restrained committing waste—not so where the covenant as to the jointure is not performed.

99. Where there is A., a tenant for life, as a jointress, remainder to B. for life, remainder over in tail, A., though dispunishable of waste at Law by reason of the mesne remainder for life, yet shall be enjoined from committing waste in a Court of Equity; but the Lord Chancellor said that if her jointure deed were made with an express clause of *without impeachment of waste*, as the case in truth was, there could be no prohibition as to those lands (4); but this Court will not permit a tenant for life, with an express clause *without impeachment of waste*, to do acts that may destroy the inheritance (5).

100. In *Bush v. Field* (6) a defendant was stayed by injunction from pulling down his rooms to the prejudice of the plaintiff's rooms.

101. The Court, at the suit of an assignee of a lease, granted an injunction to restrain the landlord from cutting ornamental trees on a lawn during the term of the lease, upon the ground that the conduct of the landlord since the execution of the lease amounted to a consent to the tenant's plan of improvement, laying out the lawn, &c. (7).

Landlord restrained cutting ornamental trees on a lawn on the ground of acquiescence in laying out lawn, &c.

102. The sending a surveyor to mark out trees is a sufficient ground for injunction.

(1) 1 Eq. C. Abr. 400, cited Dick. 197.

Bassett v. Bassett, Finch. 189.

(2) *Cooke v. Whalley*, 1 Eq. C. Abr. 400.

(5) *Aston v. Aston*, 1 Ves. Sen. 263

(3) *Carew v. Carew*, 1 Eq. C. Abr. 400.

(Belt's Ed.), and the note and references therewith; *v. Marker v. Marker*, Hare, 1, 17.

(4) *Tracy v. Tracy*, 1 Vern. 23; *Tresham v. Gerrard*, Tothill, 144;

(6) Cary, 90.

(7) *Jackson v. Cator*, 5 Ves. 688.

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ground for an injunction, the Lord Chancellor observing that he did not wait till they were cut down (1).

103. Where the Irish Society, in 1618, had granted lands to the Fishmongers' Company, reserving the timber, and by deed of 1741 the society declared they would not claim trees thereafter planted, but that the company might cut them, so as they should be first applied in the improvement of the estate; and in 1747 the company demised to a lessee, excepting the trees, with liberty to themselves to cut them for the improvement of their estates, according to their interest, but not for sale, and he cut for sale; the Court held, that the nature of their title was not any objection to a suit by the company for an account and injunction (2).

Timber cut down by a tenant for life having a vested remainder in fee, while contingent estates are in expectancy, and the produce of the sale thereof, belong to the party who shall appear entitled at the death of the tenant for life.

104. Where B. was tenant for life, with remainder to his first and other sons in tail, remainder to O. for life, remainder to her first and other sons in tail, with other contingent remainders, with remainder to B. in fee, and O. had a child, who died almost immediately before any other contingent remainderman came *in esse*; and B. cut down timber, his own remainder in fee being the next existent state of the inheritance; but afterwards O. had another child; B. will not be allowed to take advantage of his own wrong by taking the timber so cut, nor will the second child of O. be entitled until it shall be seen whether B. shall have a child; but the produce must be paid into Court by B. with interest at 4 per cent., and accumulated for the benefit of such person as shall appear at the death of B. to have title to it (3).

Executors of tenant for life are liable to account for waste during tenant's life—but refused (here) for laches—Executors of tenant for life restrained committing waste.

105. A bill by a landlord for an account of waste, in cutting timber, by a tenant in his lifetime, lies against the tenant's executors. But where the waste had been committed for fifty years during the tenant's life, and the bill was not filed till a few years after his death, the account was refused as to all the waste in his lifetime, but granted with an injunction as to waste by the executors (4). Where G. was tenant for ninety-nine years, if he should so long live, *sans waste* (except voluntary), remainder to trustees to preserve, &c., remainder to his first, &c., sons in tail male, remainder

(1) *Jackson v. Cator*, 5 Ves. 688.

Cox, 72; *et v. Garth v. Cotton*, 3 Atk.

(2) *Fishmonger's Company v. Beresford*, Beat. 607.

751; 1 Ves. Sen. 524, 546.

(3) *Williams v. Bolton (Duke)*, 1 *Fishmongers' Company v. Beresford*, Beat. 607.

to Sir J. C. in fee; and G., before a son born, and Sir J. C. agreed, by articles which recited, contrary to the fact, that the plaintiff's father was seised of an estate for life, to cut down timber on the estate, and to divide the produce between them, and that Sir J. C. should not take advantage of its being waste; and they cut timber of the value of £2000, and G.'s son, born ten years after, attained twenty-one and suffered a recovery of the estate to the use of himself and his heirs; the Court held, that the plaintiff, G.'s son, should have satisfaction for so much of the value of his inheritance as the late Sir J. C. had received under the agreement; and, his executors admitting assets, £1000, with interest at 4 per cent. from the filing of the bill, was directed to be paid to the plaintiff, the son of G., by the executors of Sir J. C. (1); and Lord Chancellor Hardwicke also held, that the trustees might have had an injunction to stay waste before the contingent remainderman came *in esse*. And if there be tenant for life, remainder for life, remainder in fee, if tenant for life commits waste in trees, and afterwards remainderman for life dies, the remainderman in fee may bring an action for waste (2). And where first tenant for life gave leave to a second, who was without impeachment of waste, to cut timber, the Court granted an injunction, for he ought not to do waste before the estate to which the privilege was annexed came into possession (3).

106. Where A. devised lands incumbered with debts to B. for life, remainder to C. in fee, and B. cut down timber from the estate, B. was decreed to pay two fifths of the debts, and C. the remaining three fifths, and B. to account for the timber which he had cut, and this to be taken as part of the three fifths which the remainderman was to pay (4).

107. In *Attorney-General v. Geary* (5) it was held, on the construction of a charity deed in favour of the rector and scholars of Exeter College, and the vicars of four parishes, that the estates were given as one fund for the benefit of two distinct institutions,

(1) *Garth v. Cotton*, 3 Atk. 751; 1 Ves. Sen. 524, 546. in *Garth v. Cotton*, ante, *Abrahall v. Babb*, 2 Eq. C. Abr. 757; 2 Freem.

(2) *Ib.*; *et v. Robinson v. Litton*, 8 Ch. 58; 2 Show. 69.

Atk. 210; *Farrant v. Lovel*, *Ib.* 723. (4) *James v. Hales*, 2 Vern. 267;

(3) *Ib.*; *et v. Abraham v. Bubb* (called Prec. Ch. 44.

(5) 3 Mer. 514.

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the whole to be managed for the benefit of both, in a due course of provident ownership; that the trustees were not restrained after the expiration of the forty years during which a power was given to cut timber, subject to certain exceptions, and after the forty years to cut as they thought fit and pay the produce as therein mentioned, from cutting timber for the purposes of repairs, nor from cutting timber on one part of the estates for repairs on another part, nor from selling timber when cut, and applying the produce in necessary repairs, so long only as they cut no more timber on the whole property than the repairs on the whole property required; and that the power of cutting young slabs and tillers (one of the above-mentioned exceptions) still continued with the qualification annexed to this exception.

Intended
devisee re-
strained com-
mitting waste
until heir
elected.

108. Where a will purporting to give a real estate to A., but not executed agreeably to the statute, gave (*inter alia*) a contingent legacy to an infant (who became the testator's heir-at-law), and expressly directed that if any who received benefit by the will should dispute any part of it they should forfeit all claim under it; the Court held, that the infant heir should elect when he came of age; and in the meanwhile A., the intended devisee, was allowed to be in possession of the estate, though restrained from committing waste, and subject to account, as to which his share of the personal estate was declared liable to make satisfaction (1).

Tenant in tail
not restrained
committing
waste.

109. Where A. devised all his lands, &c., to his wife, and if it should happen that he should have no son nor daughter by him begotten upon her body, and for want of such issue, then the said premises to return to his brother B., if he should be then living, and to his heirs for ever, paying to two other brothers £150 within a year after the wife's death; the Court decreed it to be an estate tail in the wife, and not an estate for life only; that "by no son nor daughter" must be understood "no issue;" and that she ought not be restrained from committing waste (2).

110. Waste will be restrained although the act done may lead to the improvement of the land, if it immediately occasion any damage to the inheritance; and where, in execution of an arrange-

(1) *Boughton v. Boughton*, 2 Ves. Sen. 12 (v. Belt's Supp. 250).

(2) *Wyld v. Lewis*, 1 Atk. 432.

ment for paying off incumbrances, A., being owner in fee, conveyed the fee simple to B., who re-demised for lives renewable for ever to A., at a rent equal to £6 per cent. on his purchase-money, to hold in the same manner as A. then held and enjoyed the same, and the lease contained the common covenants, including one to deliver up the premises in repair, except casualties by fire; the Court held, that A. did not retain the rights of an owner in fee subject to the rent, but was restrainable from committing waste (1).

111. Where a testator devises the legal estate to trustees, and gives to a tenant for life an equitable estate only, with remainders over, such tenant for life ought not to cut timber without the consent of the trustees (2).

Equitable tenant for life with remainders over, not to cut timber without consent of trustees.

112. Tenant for life unimpeachable of waste, except in the park, demesne land, and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are an ornament or shelter to the messuage (3).

113. A tenant for life without impeachment of waste will not be restrained from felling trees fit for the purpose of timber, though young, and not such as would be felled in a course of husbandlike management of the estate (4). A tenant entitled to a life interest in a term of years unimpeachable of waste, has a right to fell timber for his own benefit, namely, such timber as is fit and proper to be cut in the course of a due and husbandlike management of the woods containing the timber (5); but a tenant for life entitled to timber for repairs cannot sell the same to reimburse herself expenses incurred in repairs (6).

Tenant for life sans, &c., not restrained felling trees fit for timber, though young.

114. Where the residue was bequeathed in trust, to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively, without impeachment of waste, with various limitations in strict settlement, all the estates for life being without impeachment of waste, and the ultimate remainder in fee, and the trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion, the first tenant for life cannot

First tenant for life restrained cutting the whole of the timber (here)—on the principle of equitable waste.

(1) *Coppinger v. Gubbins*, 9 Ir. Eq. Rep. 304; 3 J. & Lat. 397.

(4) *Smythe v. Smythe*, 2 Sw. 251; 1 Wils. 426.

(2) *Denton v. Denton*, 7 Beav. 388.

(5) *Bridges v. Stephens*, 2 Sw. 150.

(3) *Newdigate v. Newdigate*, 1 Sim. 131; *Marker v. Marker*, 9 Hare, 1.

(6) *Gower v. Eyre*, Coop. 156.

cut the whole (1). But Lord Eldon said that the application of the principle of equitable waste to a wood covering thirty acres, was carrying it to an extent of which he did not recollect an instance, and that he could not admit that it was wiser to extend than to confine these injunctions (i.e., against equitable waste).

115. Where land is devised to be sold, the money to be laid out in other estates to be settled, the rents and profits until sale to go to the persons entitled to the estates to be purchased; tenant for life without impeachment of waste cannot cut timber on the estate to be sold (2), since he would thereby have the benefit of double waste (3).

116. A tenant for life without impeachment of waste is at liberty to cut timber generally, treating it in a husbandlike manner, independent of the effect upon the beauty of the place, provided that the exercise of that liberty cannot be checked by a due application of the principles upon which, in the contemplation of this Court, that is waste which is not acknowledged such at Law, that is to say, equitable waste (4); and in *Ford v. Tynie* (5) it is said that what a prudent owner would do in the proper course of management is no measure of what a tenant for life without impeachment of waste may do as to cutting timber planted or left standing for ornament.

117. In cases of lands exchanged under Inclosing Acts, tenants for life impeachable for waste cannot cut timber for inclosures, but must raise the money for inclosure by mortgage, under the powers in the Act; and *semble*, estovers from one estate are not applicable to the exigencies of another (6).

118. Tenant for life with liberty to cut timber at seasonable times, is not to cut trees planted for ornament or shelter to the mansion-house, or sapling trees not fit to be cut or felled for timber (7); and where D. provided, by a codicil to his will, that his wife, whom he had made a tenant for life, might cut timber without any restriction, for her own use and benefit, at all seasonable times, Lord Chancellor Thurlow restrained her from cutting

(1) *Burges v. Lamb*, 16 Ves. 174,
185.

(2) *Ib.* 180.

(3) *Plymouth v. Archer*, 1 Bro. C. C.
159.

(4) *Burges v. Lamb*, 16 Ves. 185.

(5) 2 De G. J. & S. 122.

(6) *Lee v. Alston*, 1 Bro. C. C. 194.

(7) *Chamberlyne v. Dummer*, 3 Bro.
C. C. 549.

down trees planted or growing for ornament, &c., shelter, &c., and enjoined her from cutting down any timber or other tree, except at seasonable times and in a husbandlike manner, and from cutting down saplings and young trees not fit to be cut for the purposes of timber (1).

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119. Where A. was tenant for life, remainder to his first, &c., sons in tail, remainder to B. for life, remainder to his first, &c., sons in tail, remainder to C. in tail, who died without issue; and A. cut down timber, A. and B. having no son born, the heir of the grantor (who was seised in fee) is entitled to the timber, both at Law and in Equity. The right to this timber belongs to those who at the time of its being severed from the freehold are seised of the first estate of inheritance, and the property becomes vested in them (2); and where one seised in fee conveys the lands and all trees and mines to trustees in fee, to the use of A. for life, remainders over, A. cannot open the mines or cut down the trees. The Lord Chancellor said: A. having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber trees; that the timber and mines were part of the inheritance, and that no one should have power over them but such as had an estate of inheritance limited to him (3).

If mere tenant for life cuts timber, it belongs to those seised of the first estate of inheritance.

120. Tenant in tail after possibility of issue extinct being punishable for waste by the law, has, equally with tenant for life without impeachment of waste by settlement, an interest and property in the timber (4); and tenant in tail after possibility of issue extinct, having been once tenant in tail in possession with the other donee, and therefore punishable for waste, may not only commit waste, but also convert to her own use the property wasted, and will, therefore, not be restrained in Equity except for malicious, or destructive, or equitable waste (5). But upon a motion to

Tenant in tail after possibility, &c., is punishable for waste, but will be restrained for malicious, destructive, or equitable waste.

(1) *Chamberlyne v. Dummer*, 3 Bro. C. C. 549; S. C. sub. nom. *Chamberlain v. Dummer*, Dick. 600; *O'Brien v. O'Brien*, Amb. 107.

(2) *Whitfield v. Bewit*, 2 P. Wms. 240; *v. Bewick v. Whitfield*, 3 P. Wms. 267; *Roll v. Somerville* (Lord), 2 Eq. Ca. Abr. 759, pl. 8; *Garth v. Cotton*, 3 Atk. 751; and 1 Ves. Sen. 524,

546; S. C. Harg. Co. Litt. 218 b, note (2).

(3) *Ib.* 242.

(4) *Williams v. Williams*, 15 Ves. 419, 430; *v. Lewis Bowles Case*, 11 Rep. 80 a.; Litt. s. 352; *Abraham v. Bubb*, 2 Freem. 53; *Turner v. Wright*, 2 De G. F. & J. 247.

(5) *Ib.*; *et v. Garth v. Cotton*, Dick. 183; 3 Atk. 751; 1 Ves. Sen. 524, 546.

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Jointress to be
restrained
committing
wilful waste.

stay a jointress tenant in tail after possibility, &c., from committing waste, the Court held, that she, being a jointress within 11 Hen. 7, ought to be restrained from wilful waste, and the injunction was granted; for by the statute she is restrained from aliening (1). But where the under-tenant of a jointress for sixty years, if she should so long live, committed waste *sparsim*, so as at Law the estate was forfeited, but insisted he had improved the yearly value, and offered to take a lease at the improved rent, and to pay for the timber cut; *quære*, whether the Court will relieve as to the waste (2).

Equitable
waste by
tenant for life
is a breach of
trust.

121. Equitable waste by tenant for life is a breach of trust, and his assets after his death are answerable for the same (3).

122. A partition of a house, held under a lease for the unexpired residue of a term of years, subject to a rent and covenant, was refused, the nature of the property and the interest of the parties not warranting a partition. For if it were decreed, the landlord might immediately apply for an injunction to restrain the parties from executing it by any act amounting to waste, and the Court could not protect one of the tenants in common from a breach of covenant which might be committed by the other (4). But, under the 32 Hen. 8, c. 32, the termor of an undivided share might have a partition, though it would only bind during the term (5), the right to the partition being only commensurate with the interest, and a tenant for years or for life cannot insist, as against the owners of the other shares, for a partition to endure beyond his own estate (6).

123. In *Birmingham Canal Company v. Lloyd* (7) the Court refused an injunction against draining, preparatory to opening a coal mine, with prejudice to a canal, before establishing a right at Law, on the ground of laches for two years, and permitting expenditure in proceeding towards getting coal, and coming for an

(1) *Cook v. Winford*, 1 Eq. C. Abr. 221, pl. 2; 3 Madd. 528; *Aston v. Aston*, 1 Ves. Sen. 264, 267; *Abraham v. Bubb*, 2 Freem. 53; 2 Show. 69; 2 Eq. C. Abr. 757; *Williams v. Day*, 2 Ch. Ca. 32.

(2) *Ligo v. Smith*, 2 Vern. 263.

(3) *Marquis of Ormonde v. Kynnersley*, 5 Madd. 369.

(4) *North v. Guinan*, Beat. 342.

(5) *Ib.*; *Baring v. Nash*, 1 V. & B. 551, 555.

(6) *Baring v. Nash* (*supra*); *Gaskell v. Gaskell*, 6 Sim. 643.

(7) 18 Ves. 515.

injunction when the plaintiffs were about to get coal; and Lord Eldon said that the act of stopping or draining a colliery about to be wrought might possibly, with reference to rival ownerships, be the means of making it absolutely unproductive twelve months thereafter, when it was to be wrought, instead of at the then present time; and the *Anonymous Case* in Ambl. (1) was mentioned by Lord Eldon, where the Court was asked to stop a colliery actually working, but Lord Hardwicke refused the injunction.

124. Where a tenant had cut down timber, and a bill was brought against him for a discovery, and he demurred for that, as being waste, his answer would subject him to a forfeiture, the Court allowed the demurrer (2). Bills to restrain waste cannot be filed without waiving all forfeitures and penalties (3).

Bills to re-
strain waste
must waive
forfeitures.

125. Permissive waste of a mansion on the part of the tenant is not a sufficient ground for refusing a renewal of a lease for lives with a covenant for perpetual renewal (4).

126. On the ground that where an estate had been limited under her marriage settlement to herself, A., for life, with remainder to her children by her deceased husband, in such a manner as she should appoint, remainder in default of appointment to all the children as tenants in common, an agreement by the children that on her joining in suffering a recovery the first use to which the recovery should enure should be to her, A., for life, without impeachment of waste, might at the hearing be deemed valid in Equity; the Court (Lord Chancellor Eldon) refused to continue an injunction to restrain her from cutting timber unless security were given for paying to her and her representatives the full value of the timber which she might have cut; in case at the hearing it should appear that she was entitled to it, and the Lord Chancellor said that he had not met with any case where, in an arrangement settling the interests of all the branches of a family, it had been held, that children might not contract with each other to give to a parent, who had a power to distribute property amongst them, some advantage which the parent without their contract with each other could not have. But that this, however,

(1) 209.

(3) *Suffolk (Earl) v. Green*, 1 Atk.

(2) *Att.-Gen. v. Vincent*, Bun. 192. 450; Mitf. Pl. 162.

(4) *Mulloy v. Goff*, 1 Ch. Rep. 27.

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was by no means simply the case of execution of a power; but that it was a strange mixture of the execution of a power and of conveyance by record of the estates of both the parent and the children. Upon the whole he inclined to think that the injunction should be dissolved; but that, in all events, A. should not be restrained from cutting timber unless security were given to her for the full value of all she might cut in her lifetime, to the intent that she might not be a sufferer by an injunction which, at the hearing of the cause, might not be thought sustainable (1).

Tenant for life
no right to
share of money
arising from
sale of decay-
ing timber.

127. Where A. was tenant for life, remainder to B. in tail as to one moiety, remainder to C., an infant, in tail as to the other moiety, remainder over, and there was timber on the premises greatly decaying, and B., the remainderman, filed a bill praying that the decaying timber might be cut down, sold, and the money divided betwixt him and the infant, and the tenant for life insisted on his right to have part of the money; the tenant for life, since he has a right to what may be sufficient for repairs and botes, must have sufficient left for that purpose, and an allowance for all damage done to him on the premises held for life by him; but to have no share of the money arising by the sale of this, i.e., decaying timber; and timber, when severed by the act of God, as by tempest, or by accident, or by a trespasser and by wrong, belongs to the first owner of the inheritance; but decaying timber, if for the defence and the shelter of the seat or house, or for ornament, must not be cut down; also, where an infant is interested in the inheritance no timber can be cut down but by the approbation of the Master (now of the Court); and the infant's moiety of the money is to be invested for his benefit (2).

Timber
severed by act
of God—or by
wrong—
belongs to
first owner of
inheritance.

Decaying
timber for
ornament,
shelter, or de-
fence, not to
be cut down.

If infant
interested, no
timber cut
without appro-
bation of
Court.

Tenant for life
cannot cut
timber ripe,
but not decay-
ing or over-
crowding.

128. If a tenant for life cuts timber which is ripe for cutting, but not decaying or overcrowding, the act is tortious, and the right of the remainderman accrues, and the Statute of Limitations begins to run immediately (3).

As between
tenants in
common, de-
structive spoliation or waste, only restrained—and no injunction against
cutting down and selling trees according to proper course of husbandry.

129. As between tenants in common, the Court will only interfere to restrain waste in cases of destructive spoliation or waste, only restrained—and no injunction against cutting down and selling trees according to proper course of husbandry.

(1) *Davis v. Uphill*, 1 Sw. 129, 136.

(3) *Seagram v. Knight*, 36 L. J. (Ch.)

(2) *Bewick v. Whitfield*, 3 P. Wms. 918.

and a tenant in common cannot be restrained by injunction, upon the application of his co-tenants, from cutting down and selling trees and timber, where it appears that he is managing the estate according to the proper course of husbandry, and destructive waste cannot be proved (1).

130. Where the Divorce Court has made an absolute order for dissolution of marriage, and an order for permanent alimony, and the late husband is dissipating his property, or putting it out of his power, a Court of Equity will grant an injunction and receiver, to protect it for the benefit of the former wife (2).

131. Where a tenant for life is felling trees planted for ornament or shelter, the reversioner has an absolute right to restrain him; but when the reversioner stands by and sees him fell the trees, and afterwards applies to the Court, the case becomes one for damages only, and the sole question is, how far the inheritance is actually damaged by the felling of the trees (3).

132. After a decree has been made in a partition suit, the Court has jurisdiction to grant an injunction to restrain a defendant from destroying or wasting the property. But where, after a decree for sale in a partition suit, a defendant who was in the occupation of the property, but bound by no contract of tenancy, proposed to sell the hay and turnips from off the land, contrary to the custom of the country as between landlord and tenant; Lord Justice Giffard held, reversing the decision of Vice-Chancellor Stuart, that this was not such a destruction of the property as the Court would restrain, and refused an injunction. The Lord Justice said: "All that is alleged is, that as between landlord and tenant this is a violation of the custom of the country. That only amounts to this, that the land would be in a better state if the hay and turnips were left on it. But as it was admitted that there was no tenancy, the selling of the hay and turnips was what the defendant had a perfect right to do, and is no tort" (4).

133. Although the Court of Chancery will grant an injunction to restrain a tenant for life from cutting down ornamental timber,

If reversioner stands by, no injunction, but a case for damages only.

After decree for partition waste restrained—but after decree for sale in such a suit, sale of hay, &c., contrary to custom, not restrained.

Cutting down ornamental timber restrained,

(1) *Arthur v. Lamb*, 2 Dr. & Sm. 428; 12 L. T. (N.S.) 338.

(3) *Bubb v. Yelverton* (2), 18 W. R. 1147.

(2) *Sidney v. Sidney*, 17 L. T. (N.S.) 9.

(4) *Bailey v. Hobson*, L. R. 5 Ch. 180, 182.

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irrespective of
damage to the
inheritance—
Court pro-
tects, notwith-
standing trees
absurd and
fantastic.

A person
being both
tenant for life
and owner of
first estate of
inheritance,
will be
restrained.

Vicar entitled
to timber for
necessary
repairs of
vicarage-
house, &c.

irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting; and unquestionably it is true that the Court will interfere to prevent the cutting down of trees planted for ornament, even although such trees may be (in the opinion of most persons) of the most absurd and fantastic shape, and rather a deformity than an ornament; yet when the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance, and if no damage has been done the claim will be dismissed with costs (1).

134. By its general jurisdiction to repress fraud the Court of Chancery will, although the plaintiff may have a legal remedy, interfere to prevent waste being committed by a tenant for life in collusion with the owner of the first estate of inheritance, or by a person who unites both these characters in himself; and as trustees to preserve contingent remainders may file such a bill during the life of tenant for life in remainder, so may such a bill be instituted by tenant for life in remainder himself. On the same principle, where waste has been committed by a tenant for life at a time when he was also owner of the first estate of inheritance, and when there was no one capable of bringing an action, a bill to make his estate accountable may, after his death, be brought by a tenant for life in possession. But the Court must be satisfied that the acts of the deceased tenant for life were such as amounted to collusion between the two characters which he united in himself; and where the tenant for life, being also ultimate remainderman in fee, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realised by the acts of waste, which were themselves of trivial amount, a bill by a tenant for life was dismissed (2).

135. The purposes for which a vicar is entitled to cut timber are limited to proper and necessary repairs for the vicarage-house, buildings, and premises (3). Vice-Chancellor Sir W. M. James in this case said that it was quite clear a vicar was not entitled to cut timber from the glebe for the purpose of forming a fund to repair

(1) *Bubb v. Yelverton, Ex parte*
Hastings, L. R. 10 Eq. 465.

(2) *Birch-Wolfe v. Birch*, L. R. 9
Eq. 683.

(3) *Sowerby v. Fryer*, L. R. 8 Eq. 417.

dilapidations which he ought never to have allowed to occur. And with reference to the expression of Lord Hardwicke, in *Knight v. Moseley* (1), that "parsons have been indulged in selling timber and stone where the money has been applied in repairs," perhaps the rector or vicar may procure an equivalent amount of other timber by disposing of the first on the spot where he cuts it, and getting some other timber at a more convenient place.

136. The interference of Equity in case of waste "is a wholesome jurisdiction, to be liberally exercised; and depends on much latitude of discretion in the Court" (2). "The jurisdiction of English Equity in cases of waste began with the injunction *pendente lite*, but has long since extended itself to cases where no action at law was pending, but where it was needed for the protection of trust estates and estates in reversion and remainder, and has now become one of the well-defined branches of Equity jurisprudence" (3); and an injunction to stay waste has become almost a matter of course (4).

137. "The right to an account for waste already committed is incidental to the right to file a bill to prevent further waste, though no bill will lie merely for an account for waste done, because the plaintiff has an ample remedy at Law" (5). So, Equity may forbid by injunction the removal of what has been obtained by past waste (6). So, although Equity will not sustain a bill filed solely to prevent removal of timber wrongfully cut, or for an account of past waste, there being a complete remedy at Law; yet when the bill is also filed to prevent future waste, to avoid multiplicity of suits, the Court will allow an account of, and satisfaction for, what has been done, and to prevent irreparable mischief will enjoin removal of the timber (7).

(1) Amb. 176.

(2) *Kane v. Vanderburgh*, 1 John. Ch. 11 (Amr.)(3) *Per Woodward, J., Denny v. Brunson*, 29 Penn. 384 (Amr.)(4) *Smith v. City, &c.*, 19 Geo. 89 (Amr.)(5) *Per Bell, C.J., Dennett v. Dennett*, 43 N. H. 503 (Amr.)(6) *United States v. Parrott*, 1 M'All. C. C. 271 (Amr.)(7) *Spear v. Cutter*, 5 Barb. 486 (Amr.); *Hilliard Inj.* 324, 331.

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No declaration of legal rights, with reference to possible future acts.

If the plaintiff's title is doubtful, and injury not very material, and completed before bill filed, the Court will not try the question of legal title.

1. Where a defendant submits to a perpetual injunction restraining him from the specific acts complained of by the bill, as being in violation of a legal instrument, the Court will not make any further declaration of the legal rights existing between the parties, with reference to possible future acts, but will leave those matters to be decided, when they arise, either by a Court of Law, or by the Court of Chancery under 25 & 26 Vict. c. 42 (1).

2. Where an injunction was asked to restrain the defendant from interfering with the plaintiff's rights to real estate, and the plaintiff's title was doubtful and depended on questions more suitable for trial at Law, while the injury was not very material in its character, and had been in progress for three months, to the knowledge of the plaintiff, and had been fully completed before the filing of the bill; Vice-Chancellor Sir W. P. Wood refused to try the legal question of title, and dismissed the bill without prejudice to an action at law, where, if he succeeded in establishing his rights, and the defendant should afterwards continue to infringe them, he might then seek the aid of the Court (2).

3. Under the practice of the Court before the 25 & 26 Vict. c. 42 (Rolt's Act), where equitable relief by way of injunction was sought in aid of a legal right, the Court, unless such right was clear, would not, except with the consent of both parties, declare the legal rights, and grant a perpetual injunction founded on such declaration, but required the question to be tried at law; and where, on appeal, it was held that it was not clear upon the construction of an Act that it did not authorize what the defendant proposed to do, the Court held he was entitled to the opinion of a Court of Common Law upon the question, and dissolved a perpetual injunction which had been granted by the Court below (3). But by the Chancery Regulation Act, 1862, s. 1, it is enacted, that all questions of law or fact, on the determination of which the title to relief or remedy in Equity depends, shall be determined by or before the Court of Chancery; but, by sect. 2, where questions of fact may be more

(1) *Att.-Gen. v. Boyle*, 10 Jur. (N. S.) 309.

(2) *Ward v. Higgs*, 12 W. R. 1074.

(3) *Cardiff (Mayor, &c.) v. Cardiff Waterworks Company*, 4 De G. & J. 596.

conveniently tried at assizes, issues may be directed by the Court of Chancery.

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4. Where there was any doubt as to the exclusive legal title of a party claiming an injunction in aid of that legal title, the Court would not exercise jurisdiction without giving an opportunity of trying the legal title by proceeding at Law (1). If doubt as to exclusive legal title of plaintiff, Court gave opportunity of trying legal title.

5. On a bill to restrain the exercise of a legal right, it is the duty of the plaintiff to satisfy the Court that there are substantial grounds for doubting the existence of the legal right (2). To restrain exercise of legal rights, plaintiff must shew substantial grounds for doubting them.

6. The Court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may, in some sense, be regarded as unconscientious if contrary to the dictates of prudence and reason, although the actor does the act without any malicious motive (3). Court may restrain unconscientious exercise of legal right—and if contrary to prudence and reason, and although no malice.

7. Where a person possesses a legal right, a Court of Equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it. Nor will Equity interfere even though the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into irrevocable engagements. To raise an equity in such a case there must be a misrepresentation of existing facts, and not of mere intention (Lord St. Leonards *dissentiente*) (4). But, *per* Lord St. Leonards, it is immaterial whether there is a misrepresentation of a fact as it actually existed, or a misrepresentation of an intention to do or abstain from doing any act which would lead to the damage of the party whom you thereby induced to deal in marriage, or in purchase, or in anything of that sort, on the faith of that representation (5). The Court will not restrain exercise of legal right from representations of intention to abandon it—and no relief, though irrevocable engagements entered into—there must be misrepresentation of existing facts and not of mere intention. (Per H. L., Lord St. Leonards *diss.*)

8. The equity of the plaintiff's case may consist in the mode adopted by the defendant of exercising a certain right, rather than in the want of such a right itself; involving the necessity of a summary interference to reconcile the conflicting claims of the Plaintiff's equity may arise from defendant's mode of exercising a right.

(1) *Bramwell v. Halcomb*, 3 My. & Cr. 737, 736.

point, S. C. 2 De G. M. & G. 94.

(2) *Sparrow v. Oxford, Worcester and Wolverhampton Railway Company*, 9 Hare, 441; affirmed on this

(3) *Turner v. Wright*, 6 Jur. (N. S.)

809.

(4) *Jordan v. Money*, 5 H. L. C. 185.

(5) *Ib.*

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respective parties. Thus, where the defendant was entitled to a water-power supplied by a waste weir from a public canal, in a bill for an injunction brought by the canal company, the Court remarks, "The defendants claim that during the time that business is suspended on the canal they have a right to have the water flow in its original channel; but they have not taken the right method of asserting their right, if they have any. The plaintiffs are in possession of the water for the purpose of their canal, and the time during which they need it for the actual business, and the quantity which they need to keep in the canal during the winter season, when business is suspended, are necessarily quite indefinite. It is impossible, therefore, that the defendants can be allowed to define for themselves the plaintiffs' right, and interfere with their possession. They insist on opening the weirs and helping themselves, according to their own judgment, but this would be a lawless mode of vindicating their rights, and it cannot be allowed. If the defendants have any right to the water beyond what the plaintiffs are willing to concede to them, they must bring their bill or action to have those rights defined before they can be enforced" (1).

Irreparable mischief stayed, though denial of title. If privity of estate injunction, though no irreparable mischief. Injunction to prevent destruction though title and possession in dispute.

9. Notwithstanding a denial of title, an injunction may issue to stay irreparable mischief or waste (2).

10. Where there is a privity of estate, as between reversioner and particular tenant, an injunction may be had, without irreparable injury; otherwise where the parties are strangers to each other in reference to the estate, or mutually adverse claimants; whether the act be waste or trespass (3); and Chancery will interpose to prevent the destruction of the inheritance, even where both title and possession are in dispute (4).

SECT. 18.—Annuities.

If annuity not in arrears, Court will

1. Where the only remaining assets of a testator consisted of a devised real estate, which was liable to his bond for securing an

(1) *Per* Lourie, J., *Erie, &c. v. Walker*, 29 Penn. 173 (Amr.)

(3) *Georges, &c., v. Detmold*, 1 Ind. Ch. Dec. 371.

(2) *United States v. Parrott*, 1 M'All. C. C. (Cal.) 271 (Amr.)

(4) *Cornelius v. Post*, 1 Stockt. 196 (Amr.); *Hilliard, Inj.* pp. 13, 19, 32, 572, 2nd Ed.

annuity, and before the annuity had fallen into arrear the annuitant instituted a suit for administration of the real and personal estate, and that a sufficient part of the assets might be set apart and appropriated to answer the annuity, and for an injunction to restrain the defendant from selling, mortgaging, or otherwise disposing of the real estate, and for a receiver; the Master of the Rolls (Lord Romilly) said that all he could do was to declare that the real estate would become liable to pay the penalty of the bond (£3000) in the event of the non-payment or falling into arrear of the growing payments of the annuity (£200) secured by the bond, and that the decree could then be registered so as to secure the plaintiffs; but that the annuity never having been in arrear the plaintiffs, who came merely for their own protection, must pay the defendant's costs (1).

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only declare
the estate
liable in the
event of its
becoming so.

2. Where in a suit relating to two annuities secured on real estate, and to which the grantor was not a party, a receiver had been appointed "of the incomes of the outstanding trust property" in the pleadings mentioned, and the receiver had entered and continued in possession of the real estate for six years; the Master of the Rolls (Lord Langdale) refused to restrain the grantor by injunction from distraining on the tenants, on the ground that the order for appointing a receiver did not state distinctly on the face of it over what property the receiver was appointed, the Court having appointed a receiver "of the incomes, &c.," and not of the rents of the estate (2).

3. Where a testator charged annuities exclusively on his real estate, the legal estate of which he devised to trustees upon trust to pay the rents to, or permit the same to be received by, one for life, with remainders over, and on the testator's death the tenant for life took possession of the estate and title deeds, and kept down the annuities, but cut down some timber, and the trustees acquiesced for four years, but afterwards proceeded by action to recover the deeds and to receive the rents; the Court, by motion, restrained the proceedings, on the tenant for life undertaking to keep down the annuities, not to grant leases or cut timber without the consent of the trustees, and bringing the deeds into Court.

(1) *Norman v. Johnson*, 29 Beav. 77

(2) *Crow v. Wood, Whitehead v. Wood*, 13 Beav. 271.

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If no arrears, the Court will not restrain executors of grantor of annuity paying simple contract debts, unless probable misapplication. Grantor of annuity concealing prior incumbrances restrained receiving rents.

Lord Langdale also observed that certainly the plaintiff (equitable tenant for life with remainders over) had no right to cut down timber without the consent of the trustees (1).

4. Where an annuity is secured by a covenant and warrant of attorney, and all the arrears have been paid, the Court will not restrain the executors of the grantor from paying his simple contract debts until they have set apart a fund to answer the future payments, unless a case of past or probable misapplication of assets is made out (2) (3).

5. Where A., having charged his estates by mortgages and other incumbrances to a very large amount, appointed B. to be his steward or receiver of all his estates, with verbal directions to pay the interest to the mortgagees, and to pay over the surplus of the rents to himself, and on the making a fifth mortgage A., by deed, appointed B. receiver of the estates comprised in that mortgage, and to pay over the residue of the rents to himself; and A. afterwards granted several annuities, which he charged on all the mortgaged premises, and demised the same to a trustee for securing the said annuities in manner therein mentioned, and, subject thereto, to permit A. to receive the surplus for his benefit, and at the time of granting these annuities A. represented the estate to be free from all incumbrances; on a bill filed by the annuitants against A. and B. (without making any of the prior incumbrancers parties), the Court restrained B., until further order, from paying over any part of the rents to A., and appointed a receiver without prejudice to the prior mortgagees' taking possession. The Court said it was perfectly clear that A. ought not to be permitted to receive any part of the rents (4).

Devisee of grantor (who had admitted the grant) restrained pro-

6. Where, in his answer to a bill of foreclosure, the grantor

(1) *Denton v. Denton*, 7 Beav. 388.

(2) *Read v. Blunt*, 5 Sim. 567.

(3) By the 17 & 18 Vict. c. 90 (An Act to repeal the Laws relating to Usury and to the Enrolment of Annuities), the statutes by which memorials of grants of annuities were required to be enrolled have been repealed; but by a subsequent Act (18 & 19 Vict. c. 15, ss. 12, 14) it is provided that any annuity or rent-charge granted after the

26th of April, 1855 (the date of the passing of the Act), otherwise than by marriage settlement or will, for a life or lives, or for any estate determinable on a life or lives, shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, until the particulars mentioned in the Act are registered in the Court of Common Pleas.

(4) *Dalmer v. Dashwood*, 2 Cox, 378.

admitted the grant of the annuity, and that it was then a subsisting charge upon the estate, the Court held that his devisee was precluded from objecting to the validity of the annuity for want of a memorial, and granted an injunction to restrain him from proceeding at Law to set it aside (1).

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ceeding to set aside annuity for want of memorial.

7. On a bill by W., the grantor of an annuity, against F., his surety for the payment, and to whom W. had given a bond of indemnity, to restrain an action on the bond; the Court held, that a surety under an annuity deed, redeeming the annuity subsequently to the bankruptcy of the grantor of the annuity, was entitled to the benefit of the grantee's proof under the grantor's commission, and to proceed by action against the grantor, who had obtained his certificate, for the arrears of the annuity subsequent to the commission (2).

Surety redeeming annuity after bankruptcy of grantor—is entitled to benefit of grantee's proof.

8. Where S., being in cohabitation with M., a married woman, in consideration of her agreeing to cohabit with him granted an annuity to a trustee for her, and covenanted to charge it on any real estate he might become possessed of, the first payment to be made upon the death or marriage of S., or withdrawing his protection from her, and S. also gave to the trustee a bond and warrant of attorney to enter up judgment to secure the annuity; and some years afterwards S. married, previously to which the cohabitation had ceased, and an action was brought on a judgment which had been entered up on the warrant of attorney at the suit of the trustee, and S. filed a bill to restrain the action, and for cancelling the grant of the annuity; upon a demurrer put in for want of equity the Court held, that upon the face of the annuity deed bond and warrant, they were given for an unlawful purpose, and would be held void at Law; and that the case fell within the principle adopted by Lord Chancellor Cottenham in *Simpson v. Lord Howden* (3), that where an instrument upon the face of it is illegal, the defendant will be left to raise his defence at Law, and will not be permitted to come into equity for relief, and the demurrer was allowed (4).

An annuity to a married woman in consideration of cohabitation is void.

No injunction will be granted to restrain actions upon instruments upon their face illegal, and void at Law, and defendant at Law will be left to raise his defence there.

9. The Court of Chancery has a concurrent jurisdiction with Chancery has

(1) *Roberts v. Maddocks*, 13 Sim. 549.

(3) 3 My. & Cr. 97.

(2) *Watkins v. Flanagan*, 3 Russ.

(4) *Smyth v. Griffin*, 13 Sim. 245;

421; S. C. 1 G. & J. 199.

affirmed 14 L. J. (N. S.) (Ch.) 28.

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concurrent
jurisdiction
with Common
Law in
annuity cases.

Courts of Law in annuity cases, and therefore can entertain a suit to raise the arrears of an annuity, though the deed granting the annuity contains a clause enabling the grantee to distrain, and the bill contains no averment of any substantial difficulty to prevent the plaintiff availing himself of this remedy (1).

10. Where a testator having by his will devised all his lands to A., subject to an annuity for his wife, and afterwards devised part of those lands to B. and C., confirming all his devises and bequests in favour of his wife; the House of Lords held, that she ought not to be restrained from resorting to this part of the lands for her annuity, and reversed a decree for an injunction made by the Court of Exchequer (2).

11. Under the 4th section of the 5 Vict. c. 5—which provides “That it shall be lawful for the Court of Chancery, upon the application of any party interested, by motion or petition, in a summary way, without bill filed, to restrain the Governor and Company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the Governor and company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon;”—an injunction may be obtained in a summary way to restrain the payment of a government annuity. And where, by articles entered into previously to the marriage of Mr. and Mrs. W., it was agreed that an annuity of £100 a year, payable by the Commissioners for the Reduction of the National Debt, to which the lady was entitled for her life, should be settled upon her for her separate use, and Mr. W. had declined to carry out these articles, and it appeared that Mrs. W. had filed a plaint against him to compel him to do so, and had given notice thereof at the office at which the annuity was payable, but was informed that the annuity would still be payable to her husband, notwithstanding the plaint; the Master of the Rolls (Lord Romilly) said it was clear that this annuity was within the section, and that the

(1) *Manly v. Hurwkins*, 1 D. & Wal. 363.

(2) *Reeves v. Newenham*, 2 Ridg. P. C. 11; Vern. & Scriv. 462.

applicant might take an injunction, on giving an undertaking as to damages in the usual way (1).

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SECT. 19.—*Judgments.*

1. Although the 1 & 2 Vict. c. 110, s. 13, declares that a judgment shall not be enforced for a given period, yet a Court of Equity will in the meantime restrain trustees from paying to the debtor, a tenant for life, the income arising from the property affected until the charge can be enforced. And where a judgment creditor of a tenant for life of real estate had sued out an elegit, but was unable to obtain payment of his demand as the estates were vested in trustees; upon a bill by the judgment creditor asking for the aid of the Court to obtain satisfaction of his demand, the Court held, that he was entitled to an injunction to restrain the trustees from paying the rents and profits of the estates to the tenant for life until the creditor was in a position to obtain the benefit of the judgment (2). A judgment creditor who has sued out an elegit without effect is entitled (independently of the 1 & 2 Vict. c. 110) to equitable relief, though the year from entering up the judgment has not expired. But *quære*, whether he is entitled to relief under the statute as regards the leaseholds of the judgment debtor before the expiration of the twelve months; however, the Court will, within the twelve months, interfere and protect the property charged by a judgment from destruction (3).

Courts of Equity restrain the payment of the rents to the debtor, until the judgment can be enforced upon the land.

The Court will protect the property charged by a judgment from destruction.

(1) *Ex parte Watts*, 19 W. R. 400.

(2) *Yescombe v. Landor*, 5 Jur. (N. S.) 780.

(3) *Partridge v. Foster*, 34 Beav. 1; *vide* 23 & 24 Vict. c. 38, s. 1, which declares that a judgment shall not be a charge upon land, so as to affect purchasers or mortgagees, unless the judgment creditor shall issue execution and duly register the writ of execution before the conveyance or mortgage and the payment of the purchase or mortgage money; but that no judgment or

writ of execution shall affect any land as to a purchaser or mortgagee, although execution shall have issued and have been registered, unless such execution shall be executed and put in force within three calendar months from the time when it was registered. And by the 27 & 28 Vict. c. 112, s. 1, it is declared that no judgment entered up thereafter shall affect any land until such land shall have been actually delivered in execution by virtue of a writ of elegit, or other lawful authority, and the writ

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2. Where A., as assignee of B., a bankrupt, gave an undertaking to C., who was the mortgagee of one farm, and was under a contract to purchase another farm, both the property of the bankrupt, and who had a distress upon the mortgaged premises, that if the distress were withdrawn he would pay to C. the arrears then due in respect of the mortgage out of the effects on the premises, and C. withdrew the distress accordingly; and afterwards the bankruptcy was annulled before A. had obtained possession of any part of the bankrupt's effects, whereupon C. brought an action on the undertaking and recovered judgment against A. personally; Lord Chancellor Brougham held, on a bill filed by A. against C., to which B. was no party, that A. could have no relief in Equity against the judgment at Law; and that he was not entitled, as against C., to claim repayment of the sum thereby recovered out of the price which C. had contracted to pay for the other farm, on the ground that C.'s rights as mortgagee ought not to be hung up on account of any difficulties that might arise as to the title to the premises agreed to be purchased (1). But although a mortgagee, as such, has a right to all his remedies, and therefore to an action at Law, yet where, by contracting to purchase the mortgaged premises, he has made his character of mortgagee conditional, depending on whether he is purchaser or mortgagee, the Court will enjoin him from proceeding at Law, putting the mortgagor, however, upon terms (2).

Equity will
set off one
judgment at
Law against
another.

3. In *Williams v. Davies* (3) the Court refused a motion to dissolve an injunction (granted on affidavit and certificate) to restrain execution on a judgment obtained by the defendant against the plaintiff, the latter having obtained a judgment to a greater amount against the former. In this case A. had obtained judgment at Law against B. for £600 and costs, and on a return to the writ of execution of *nulla bona*, distrained for the amount. After-

shall have been duly registered, but that the judgment creditor to whom land has been actually delivered in execution shall be entitled forthwith to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in the land.

(1) *Pell v. Stephens*, 2 My. & K. 334; and see this case, 4 Tyrw. 6; 1 Coop. temp. Brough. 266.

(2) *Drummond v. Pigou*, 2 My. & K. 168.

(3) 2 Sims. 461.

wards B. brought an action against A. and the sheriff for irregularity in the distress, and recovered £600 damages; B. owed other moneys to A., but was insolvent, and was about to tax his costs and issue execution against A.; and owing to the forms of proceeding at Law the judgment of A. could not be set off against the damages obtained by B. Under these circumstances Vice-Chancellor Sir L. Shadwell granted an *ex parte* injunction to restrain B. from suing out execution, A. undertaking to satisfy the lien of B.'s attorney; and upon B. afterwards moving to dissolve, His Honour, without hearing counsel against the motion, refused the motion with costs; and said it appeared to him that the case was the same as if B.'s (the defendant's) judgment had been paid, and he had been proceeding at Law to take A. (the plaintiff) in execution, and that the judgment was, in point of fact, satisfied; and that although the Court of King's Bench would not, in point of form, allow A.'s judgment to be set off against B.'s, yet that it was right that it should be done in Equity.

4. Although in *Whitworth v. Gaugain* (1) it was treated as a matter of doubt, whether a Court of Equity would interfere in favour of an equitable mortgagee against a tenant by elegit, who had got possession of the land without notice of the mortgage under a judgment obtained against the mortgagor subsequently to the mortgage; yet in the same case (2) it was subsequently held, that an equitable mortgagee of lands is entitled in Equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has subsequently thereto recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of elegit and attornment of the tenants.

5. A Court of Equity has no jurisdiction to relieve a plaintiff against a judgment at Law where the case in Equity proceeds upon a ground equally available at Law and in Equity; but the plaintiff must establish some special equitable ground for relief (3). In this case the question raised was, whether a plaintiff in Equity, who had pleaded a set-off in an action at Law and failed, could sustain a bill, without a special equitable ground, for an account

(1) Cr. & Ph. 325.

(2) 3 Hare, 416.

(3) *Harrison v. Nettleship*, 2 My. & K. 423.

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relating to the same transactions in respect to which he had pleaded a set-off; and the Master of the Rolls (Sir J. Leach) decided against the plaintiff, and dismissed the bill with costs.

6. A person who, without consideration, confesses a judgment for the purpose of thereby withdrawing his property from the demands of his creditor, *e.g.*, the creditors of a joint stock company in which he was a shareholder, has no equity for an injunction to restrain the conusee proceeding to levy the amount of the judgment, although it never was used for the purpose for which it was confessed (1).

No sale of
equitable
interest in
leaseholds
under 27 & 28
Vict. c. 112.

7. Where a judgment creditor had issued and lodged with the sheriff a writ of *fi. fa.* in execution of his judgment, and in obedience thereto the sheriff had seized and sold certain goods and chattels of the debtor, and took possession of a leasehold mansion-house to which the debtor was equitably entitled for his life, and the writ was duly registered; on a petition under sect. 4 of the Judgment Law Amendment Act (27 & 28 Vict. c. 112) for an order for sale of the debtor's equitable interest in the premises, the Master of the Rolls (Lord Romilly) held, that, inasmuch as the judgment creditor had acquired no charge on the land under 1 & 2 Vict. c. 110, s. 13, and therefore could not, on that statute, come here to ask the Court to sell, and that as the judgment creditor could not take an equitable leasehold in execution under a *fi. fa.*, he could not, under that writ, get actual possession of the land; he was not entitled, under the 27 & 28 Vict. c. 112, to petition the Court for a sale of the premises (2).

8. The 7th and 9th sections of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), give only an interim power to the Court with respect to proceedings by creditors between the filing and the enrolment of a scheme of arrangement. After the enrolment the company cannot obtain an injunction either against outside creditors or creditors bound by the scheme except upon a bill filed; and where a debenture holder had obtained judgment at Law before the passing of the Act, and had issued execution after

(1) *M'Curdy v. Martin*, 5 Ir. Eq. Rep. 515.

343; *v. Guest v. Cowbridge Railway Company*, L. R. 6 Eq. 619, 622; *Re Cowbridge Railway Company*, L. R. 5 Eq. 413.

(2) *Re Duke of Newcastle, Ex parte Padwick*, L. R. 8 Eq. 700; 18 W. R. 8; 39 L. J. (Ch.) 68; 21 L. T. (N. S.)

the enrolment of a scheme of arrangement under the Act by which all debenture holders were bound, and the creditor moved for leave under the 9th section to levy the execution, and the company moved, under the 7th section, to restrain him and the sheriffs from further proceedings; both motions were dismissed with costs; but the Lord Justice Sir G. M. Giffard said the company must have an opportunity of filing a bill, and that if a bill had been filed he should probably have granted an injunction (1).

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SECT. 20.—*Mortgages (including Chattels real).*

1. Where a covenant in a mortgage deed not to exercise the power of sale except after three months' notice was followed by a proviso that the purchaser should not be affected by the absence of such notice, and that the remedy of the mortgagor should be by an action for damages, the Master of the Rolls (Sir J. Romilly) held, that the Court had no jurisdiction to restrain the mortgagee from selling without giving the required notice (2).

Court (here) no jurisdiction to restrain mortgagee selling without giving mortgagor notice.

2. Where a trespass had been committed on plaintiffs' (lessees) mine, and an aircourse and level roads made by one of the defendants (mortgagor) through it underground to connect adjoining collieries in mortgage to other defendants, and large quantities of the plaintiffs' coal had been thereby fraudulently gotten and removed without their knowledge; Vice-Chancellor Sir W. P. Wood held, that the defendants, the mortgagees, could not be allowed to retain the user of the aircourse or roads, although the continuance of that user might be no special injury to the plaintiffs; but that, not having themselves made such apertures, they could not be ordered to fill them up; and an injunction was granted to restrain the defendants from digging coals and carrying on any workings under the lands comprised in the plaintiffs' lease, and from continuing to use the aircourse and roads, and to allow the plaintiffs access through their pits, in order that the plaintiffs might stop and close the said aircourses and roads (3).

Mortgagees restrained using aircourse and roads obtained by trespass of mortgagor.

(1) *In re Potteries, Shrewsbury, and North Wales Railway Company*, L. R. 5 Ch. 67.

(2) *Prichard v. Wilson*, 10 Jur. (N. S.) 330; 11 L. T. (N. S.) 437.

(3) *Powell v. Allen*, 4 K. & J. 343.

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3. Where an institution had been incorporated by royal charter and deed of settlement, authorizing the council or managing body to hold lands, tenements, or hereditaments, and to sell, grant, demise, exchange, and dispose of the same; but no sale, mortgage, incumbrance, or other disposition of any such lands, tenements, or hereditaments was to be made except with the approbation and concurrence of a general meeting of the proprietors of the corporation; and at a general meeting of the proprietors the council had been authorized to mortgage the property of the corporation for £25,000; upon a bill filed by a proprietor on behalf of himself and all other proprietors of the corporation, except the defendants, the council, and mortgagees of the freehold and personal property, praying an injunction to restrain the sale of the property of the institution by the defendants, and to restrain the defendants from further proceeding with a foreclosure suit, and from carrying into effect any order for sale made therein, and from conveying to any purchaser any portion of the property of the institution, Vice-Chancellor Sir R. T. Kindersley held, that the council had no power to grant a mortgage with a power of sale, but that the plaintiff was precluded, on the ground of acquiescence, from his right to an injunction (1).

Machinery, &c., placed in connection with land, unites the property in the machinery, &c., with the property in land, and a conveyance of the land passes the chattels.

4. Where J. and G., being in trade as co-partners as copper rolling manufacturers, had purchased the fee simple of an old mill, and fitted it up with greatly improved and altered machinery and gear, and they then had mortgaged the property to the plaintiff by the description of "all that land, mills, and factories, and also all the steam-engines, boilers, mill-gear, millwright work, and machinery then or thereafter to be fixed on the said land," with a covenant not to remove any part without permission of the mortgagee, and afterwards J. and G. became bankrupts; Vice-Chancellor Sir W. P. Wood, on a bill praying the usual foreclosure decree and an interim injunction, which had been granted, held, as between the plaintiffs (the mortgagees) and the defendants, mortgagor's assignees in bankruptcy (who had advertised for sale all the machinery upon the lands comprised in the mortgage), that J. and G. having placed the machinery and chattels in connection with the land while seised of the land in fee had

(1) *Clarke v. Royal Panopticon*, 4 Drew. 26.

united the property in the chattels with the property in the land, and that therefore a conveyance of the land itself alone would pass all chattels so connected with it, and that the conveyance to the mortgagee passed every description of chattel connected with the land in any manner further than by its own weight; but that such chattels as were on the premises merely resting by their own weight, did not pass; but as to one class of machinery, which consisted of a portion very massive, but yet moveable on, or entirely removeable from, a cast-iron bed firmly let in the ground, and to which bed the moveable portion was attached by clumps or screws, the bed being admitted to be part of the machine, the Vice-Chancellor held, the whole machine, the moveable part as well as the bed, was a fixture, having been there at the date of the mortgage, although actually removed by the assignees in bankruptcy before the bill was filed; and, *semble*, it makes no difference whether the interest of the person aliening is a fee simple or a term of years only (1). And the Vice-Chancellor also held, that the fixtures passing by the grant of the land, the Registration of Bills of Sale Act (17 & 18 Vict. c. 36) could have no application; but that where part of a machine is a fixture, and another and essential part of it is moveable, the latter also will be held "a fixture;" and finally, that the principle upon which the rule of law, that fixtures pass with the soil, is relaxed in favour of trade, has no application where the parties who affix the machinery are themselves owners in fee of the soil (2).

Fixtures passing by the grant of the land, not within Registration of Bills of Sale Act.

If part of a machine is a fixture, and another and essential part is moveable, the latter also held a fixture.

5. Where a mortgagee had a power on default of payment, on notice, to sell the premises, together or in lots, by private contract or public auction, subject to such special or other conditions of sale as he might think fit, and he proceeded to a sale after ample notice, but under very special conditions of sale, directed against certain defects of title which the mortgagor himself had, since executing the mortgage, insisted upon; Vice-Chancellor Sir W. P. Wood refused to interfere to prevent the sale under such stringent provisions (3).

Mortgagees' power of sale not restrained (here).

6. Where by a deed, the amount due to the first mortgagee was a party con-

(1) *Mather v. Fraser*, 2 K. & J. 536; (2) *Ib.*
2 Jur. (N. S.) 900; 25 L. J. (Ch.) 361; (3) *Kershaw v. Kalow*, 1 Jur. (N. S.)
v. Waterfall v. Penistone, 6 E. & B. 867; 974.
3 Jur. (N. S.) 15; 26 L. J. (Q. B.) 100.

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testing the amount admitted by other incumbrancers due to first incumbrancer, cannot have the benefit of a stipulation by first incumbrancer (in consideration of the admission) not to exercise a power of sale. But first mortgagee restrained selling where a puisne incumbrancer had offered to pay him off.

confirmed to him by the subsequent incumbrancers, and he thereby agreed not to execute his power of sale for a limited time; the Master of the Rolls (Sir J. Romilly) held, that a party who by his bill contested the amount so admitted to be due to the first mortgagee could not take advantage of the stipulation in the deed not to sell within the time, and refused an injunction to restrain such sale (1). But where a puisne incumbrancer had offered to pay off the first mortgagee, and that being declined, he had filed a bill to compel a transfer; the first mortgagee, having afterwards proceeded to sell the property, was restrained by the Master of the Rolls from transferring the first mortgage and parting with the legal estate and title deeds. Sir J. Romilly said, that he concurred in the defendant's argument "that if a plaintiff came forward on a bill to redeem, and asked to restrain a transfer, he was bound to make out a *prima facie* case, and could not, as a stranger, say, 'I am entitled to redeem, and restrain the transfer of the legal estate.' That was all that was decided by *James v. Biou* (2), and to that extent he concurred. But he was of opinion that the plaintiff had made out a *prima facie* case, and that she was an incumbrancer on the property, but in what rank, or who were the persons entitled to redeem or foreclose, he expressed no opinion." And he said, that "if he were to say, that pending the suit the defendants might sell the property under the power of sale, and make a conveyance and transfer of the legal estate, he would, on that motion, be determining that the plaintiff had no right; for if she went on and established her right to redeem, it would be impossible for her to obtain any benefit at the hearing, as the purchaser under the execution of the power would get a title to the estate;" and that "he was of opinion that, under the circumstances of this case, the principle of protection of the property pending litigation ought to be applied, so as to induce him to restrain any dealing with the legal estate, until he could determine the rights" (3).

7. Where A. and his incumbrancers, B., C., and D., joined in the appointment of a receiver, who covenanted to keep down the incumbrances, according to their priorities, and pay the surplus to

(1) *Cockel v. Bacon*, 16 Beav. 158.

(2) 3 Sw. 237.

(3) *Rhodes v. Buckland*, 16 Beav. 212.

A.; the Master of the Rolls held, that a subsequent mortgagee from A. could not sustain a bill against the receiver and A. for an account of the rents so far as related to the interest of A., and as claiming under him; and an injunction against paying the surplus to A. in the absence of B., C., and D., on the ground that the receiver could object to being harassed with a double account, and that he was the agent of all the incumbrancers as well as of A., and none could make him account without having the others present (1).

8. Where J. B., the incumbent of B. and M. H., on the 24th of January, 1851, had given to the plaintiffs a warrant of attorney to secure £300 and interest; and on the same day J. B. had entered into an agreement with the plaintiffs by which, in consideration of the £300 then lent to him, he agreed, upon request, to assign, by way of mortgage, eight acres of underwood in the parish of M. H., and all the rent-charges of the parishes of B. and M. H., for the repayment of that sum and interest; and the plaintiffs on the following day entered up judgment on the warrant of attorney, and registered the same; and on the 15th of November, 1851, J. B., by indenture, after reciting that he had requested the plaintiffs to allow him to receive the rent-charge of B. and M. H. for his own use, which they agreed to do upon having the security thereafter contained, in consideration of the sum of money lent to him in January, assigned to the plaintiffs the eight acres of underwood, and all his furniture and other effects belonging to the house in his occupation in the parish of B.; and in December, 1851, A. D. had entered up and registered a judgment against J. B. for £8000 and costs, and sued out, in 1852, a writ of *sequestrari facias*, upon which he was nominated by the bishop sequestrator, and put in possession of the rent-charge of B. and M. H.; and the plaintiffs, not being paid the £300 at the time appointed, in February, 1852, by virtue of a power of sale, sold the underwood and the furniture and effects, and with the proceeds paid off a portion of their debt; on motion for a receiver to collect the rent-charge of B. and M. H., and for an injunction to restrain A. D. from proceeding with the writ of *sequestrari facias*, and from receiving the rent-charge under it, Vice-Chancellor Sir

(1) *Ford v. Rackham*, 17 Beav. 485.

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J. Stuart held, that the motion must be refused; first, on the ground that where there were several equitable incumbrancers, one of whom by greater diligence, though later in date, got in aid of his equitable incumbrance a legal right, the Court would not disturb him in his possession; and, secondly, on the ground that by the contract entered into by the indenture of the 15th of November, 1851, the plaintiffs were estopped and concluded from getting possession of the rent-charge (1).

Mortgagee of testator restrained exercising power of sale, which he had threatened to do unless executor of testator also redeemed a mortgage made by a devisee of the testator.

9. Where, in 1830, W. had conveyed certain real estates to R. and T., and their heirs, by way of mortgage for securing £400, with a power of sale in case of default, and W. died in 1839, having devised the same property, subject to certain charges created by his will, to his sons A., B., and C., as tenants in common in fee; and in 1839, after W.'s death, B. conveyed all his one-third share under his father's will to R., H., and N. by way of mortgage, with power of sale in case of default; and R., the surviving mortgagee of the deed of 1830, threatened to sell under the power in that deed unless A., the acting executor of W., would redeem both mortgages; upon a bill by A. to redeem, and for an injunction, the Court, upon motion, on payment into Court by A. of the money due upon the first mortgage, restrained R. from selling under the power contained in the deed of 1830, and from conveying the legal estate in the one-third share of B. comprised in the mortgage of 1839 (2).

The case of mortgagor and mortgagee is not within the principle which prevents trustees, &c., from dealing for their own benefit.

An action after foreclosure and sale, reopens the foreclosure—but (here) action restrained.

10. The principle upon which the Court restrains persons filling a fiduciary character from having any dealings for their benefit, does not apply to the case of mortgagor and mortgagee, nor is it so applied by the Court (3).

11. After foreclosure and sale an action by the mortgagee for the balance opens the foreclosure; and, therefore, the mortgagee should have time to get back the estate and tender a re-conveyance, and the mortgagor to redeem; but the mortgagee having taken possession a considerable time before, and the balance being inconsiderable, the Court (Lord Eldon, upon an interlocutory application, and Lord Erskine at the hearing), on a bill by the mortgagors, decreed a perpetual injunction to restrain an action on a

(1) *Bates v. Brothers*, 17 Jur. 1174. (N. S.) Ch. 105.

(2) *Whitworth v. Rhodes*, 20 L. J. (3) *Dobson v. Laud*, 8 Hare, 221.

bond given as a collateral security (1), overruling Lord Thurlow's opinion in *Tooke v. Hartley* (2), where, the representatives of a mortgagee, after foreclosure, having sold the mortgaged premises, and the amount not being sufficient to pay the debt, had brought an action on the bond, the Court dissolved an injunction to restrain their proceeding.

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12. Where S., in consideration of a loan of £10,000 from G., assigned to the latter two mortgages, which he held upon an estate belonging to N., and executed another mortgage of an estate of his own, by way of further security; and afterwards, on N.'s mortgage debts becoming due, S. brought an action against him on the covenants in his mortgage deeds, which G. filed a bill to restrain; on a motion before the Lord Chancellor (Lord Cottenham), to discharge an injunction which had been granted by the Vice-Chancellor, the Lord Chancellor held that it ought not to have been granted except upon the terms of the plaintiff re-conveying S.'s mortgage, and releasing him from his mortgage debt; and the plaintiff now declining these terms, and S. undertaking that the sum to be recovered in the action should be paid to the plaintiff, the injunction was dissolved; Lord Cottenham observing that G. could not prevent S. from realizing his debt from N., and at the same time hold him liable for his own debt; and that S. was responsible to G. for his own debt, and, as such, had also an interest in the money to be recovered in the action (3).

13. Where a mortgage of real estate, with a power of sale, had been made, and a judgment was entered up by a creditor against the mortgagor, who was subsequently imprisoned, and discharged under the Insolvent Debtors Acts, and the mortgagees, whilst the mortgagor was in prison, sold under their power, and the purchase-money was invested in the names of the mortgagor and the assignees; at the suit of the judgment creditor (being a bill by him under the 1 & 2 Vict. c. 110, claiming the benefit of his judgment against a subsequent insolvency of the debtor), the mortgagor and assignees were restrained from parting with the surplus of the purchase-money, on the ground that the judgment

Mortgagee is a trustee for mortgagor and those claiming under him of surplus purchase-moneys of sale of the mortgaged property.

(1) *Perry v. Barker*, 8 Ves. 527; 13 Ves. 198.

(3) *Gurney v. Seppings*, 2 Ph. 40; 1 Coop. C. C. 12.

(2) 2 Bro. C. C. 125.

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Mortgagee not restrained exercising power of sale—Trustee will be restrained selling precipitately and without notice.

creditor had an equitable interest in the money in priority over the assignees, and that the mortgagee is a trustee for the mortgagor and those claiming under him of the surplus that may remain after the sale of the mortgaged property (1).

14. The Court will not grant an injunction to restrain a mortgagee from selling under a power in the mortgage deed; but it is otherwise where there is a trustee for sale, and he proceeds precipitately, and without notice to both parties (2).

15. The Court will not, on the application of a mortgagee out of possession, restrain the mortgagor from felling timber growing upon the mortgaged estate, unless the security is insufficient; if the security is sufficient, the Court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this Court will interpose. But the Vice-Chancellor Sir J. Wigram said "the difficulty he felt was in discovering what was meant by a 'sufficient security;'" and he said, "he thought the question which must be tried was, whether the property the mortgagee took as a security was sufficient in this sense—that the security was worth so much more than the money advanced—that the act of cutting timber was not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into" (3). And so in *Hippesley v. Spencer* (4) it is held that an injunction to restrain a mortgagor from cutting timber will not be granted unless, without timber, the security is scanty or insufficient; and in *Usborne v. Usborne* (5) a mortgagor was restrained from committing any waste or spoil on an allegation that he had cut down several trees, and threatened to cut down more, by means whereof the mortgage security would be lessened.

Mortgagor not restrained felling timber unless security insufficient—and so of cutting down underwood contrary to usual course of husbandry.

But a mortgagee is entitled to an injunction to restrain a mortgagor in possession from cutting down timber, if the land without it is a scanty security, and it may be extended to cutting down underwood contrary to the usual course of husbandry, but not to underwood generally, although the mortgagor is insolvent (6).

(1) *Robinson v. Hedger*, 13 Jur. 846; 17 Sim. 183.

(4) 5 Madd. 422.

(5) Dick. 75.

(2) *Anon.* 6 Madd. 10.

(6) *Humphreys v. Harrison*, 1 Jac.

(3) *King v. Smith*, 2 Hare, 239, & W. 581.

16. It is no ground for restraining a mortgagee from enforcing his security at Law, that he has contracted to buy from the mortgagor another estate from the purchase-money, of which the mortgage debt is to be deducted (1).

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17. Where a mortgagee had commenced an action against the mortgagor to recover the mortgage money upon a collateral security, and the mortgagor had obtained an injunction against the action upon the terms of his paying into Court the sum which appeared to be really due upon the mortgage, and the sum was accordingly paid in and invested in stock, and that stock was afterwards blended with other stock purchased with another sum of money paid into Court in the same suit, and the mortgaged property having been afterwards sold under a decree in a different suit between the mortgagee and mortgagor, and the mortgagee became the purchaser, he was allowed to deduct from the purchase-money the amount due to him on the mortgage; the Lord Chancellor Lord Cottenham held that the mortgagor was entitled to receive back the stock which had been purchased with the sum paid in by him upon obtaining the injunction, and also the accumulated dividends which had accrued on the stock, on the ground that there were two funds for the mortgagee to resort to—the property pledged and the money which represented the personal liability—and that the mortgagee having elected to take payment out of the property pledged, thereby released the fund which represented the personal liability (2).

Mortgagor entitled to restrain action upon payment of mortgage money due into Court—and mortgagee having resorted to the fund arising from a sale of the mortgage security, the mortgagor is entitled to the stock purchased with the money paid in, together with the accumulated dividends.

18. A receiver in a mortgage cause will not be permitted to bring an ejectment on the title against a lessee of the mortgagor after mortgage executed, where the lessee has been in possession for twenty years, and where the consideration of the mortgage has been impeached, and the mortgagee has not proceeded to foreclose his mortgage, and no account has been taken (3).

Receiver in mortgage cause not permitted (here) to bring ejectment against lessee of mortgagor after mortgage executed.

19. A mortgagee has a right to proceed on his mortgage and bond at the same time; but the mortgagor shall not be obliged to pay upon his bond unless secure of his title deeds being delivered up; and where a mortgagee having possession of the mortgagor's

Mortgagor can restrain mortgagee in an action upon a bond unless secure of delivery of his

(1) *Pell v. Stephens*, Coop. temp. Brough. 266; 2 My. & K. 334; 4 Tyrw. 6.

(2) *Taylor v. Waters*, 1 My. & Cr. 266.

(3) *Martin v. Walker*, Sau. & Sc.

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mortgage deeds—and where there is no heir to re-convey, executor restrained suing, and money ordered into Court.

Mortgagee in fee cannot, in Equity, cut timber unless mortgage defective.

Mortgagor redeeming in a suit quieted in possession against issue entitled under a settlement by mortgagee subsequent to mortgage.

title deeds, lodged them with an attorney, who claimed a lien on them for business done for the mortgagee, on an application of the mortgagor, the mortgagee was restrained from proceeding at Law upon his collateral security (1); and in this case, there being no heir of the mortgagee who could re-convey, an executor of a mortgagee was restrained from enforcing payment, and the money was ordered into Court.

20. A mortgagee in fee may cut timber, &c., at Law, but not in Equity, unless his mortgage is defective (2).

21. Where the mortgagee, on her marriage, had settled the mortgaged estate on herself for life, remainder to the issue of that marriage, and the mortgagor brought a bill to redeem, and the mortgagee omitted setting forth the settlement in her answer, and the mortgagor had a decree to redeem, and paid the mortgage-money; and afterwards the issue of the mortgagee brought an ejectment on the settlement and recovered the mortgaged premises; the mortgagor, upon a bill to be relieved against the recovery at Law, and to have the estate in law reconveyed, and to be quieted in possession, was relieved, having paid his money pursuant to the decree, and having been in no fault; and the Court decreed the defendant (the issue) to convey, and the plaintiff in the meantime to enjoy against him, and all claiming under him, and a perpetual injunction against the judgment (3).

22. Where the Deptford Pier Company, having contracted for the purchase of certain lands, applied to W. T. P. to lend them the money to complete their contract, which he accordingly did, and conveyances were made to W. T. P., by way of mortgage, for securing the repayment of the sum advanced, and subject thereto in trust for the company; and W. T. P. afterwards obtained judgment, and was about to get possession under an elegit; and the mortgagees of the tolls, rates, and duties, who had advanced moneys to the company on the securities of certain mortgage debentures issued by the company, in conformity with a power contained in the 16th section of their Act, filed their bill against the mortgagees of the land and the company for the purpose of

(1) *Schoole v. Ball*, 1 Sch. & Lef. 176.

(2) *Withrington v. Coolenworth*, Sel. Ch. Ca. 31.

(3) *Chapman v Duncombe*, 2 Vern. 142.

having the priority of such debentures declared, and praying an injunction to restrain the mortgagees from taking possession of the lands of the company, and for a receiver; the Court, upon demurrer, held, that the plaintiffs at Law were right in using the powers the Law gave them, and that there was no equity in the mortgagees of the tolls, rates, and duties as against the mortgagees of the land, and allowed the demurrer with costs (1).

23. Where the owner of a plot of land granted a lease of it for ninety-six years to P., who mortgaged to the lessor (through a trustee) to secure £2100, and future advances; and the mortgage deed containing a power of sale, and default being made, the property was contracted to be sold to G. under the power, and the contract stipulated for the completion by G. of a house on the land by a fixed day, the lessor to deliver an abstract of title, commencing with the lease, and G. to pay as the purchase-money £250, and interest at £5 per cent., to perform the covenants, pay the costs of the agreement, and not to inquire into the right of the lessor to exercise the power of sale, or whether anything was due on the mortgage; and the lessor did not deliver the abstract, but G. took possession, furnished, and let the house, and paid interest, until he heard that judgments were outstanding against the mortgagee; the lessor died, and P. paid off the mortgage, took a re-assignment, and brought two actions, one of ejectment, and the other for the interest against G.; on a bill by G. to restrain the actions, and for specific performance of the contract, Vice-Chancellor Sir R. T. Kindersley made a decree with the general costs of the suit against P., inasmuch as he wrongly resisted the right, except the costs of the action as to interest, and the costs of the executors of the lessors. The Vice-Chancellor said that the plaintiff was entitled to the same right to have the contract completed against P. as he had against the lessors or his executors, with a conveyance on payment of £250 with interest (2).

Mortgagor paying off mortgage debt and taking re-assignment, is bound to carry out contract of mortgagee upon a sale under the power of sale.

24. On a bill by a judgment creditor of a mortgagor, the Court granted an injunction to restrain the mortgagees, who were about to sell under their power, from paying the surplus to the mortgagor (3).

Court will, at suit of judgment creditor, restrain mortgagee paying

(1) *Perkins v. Pritchard*, 13 Sim. 277; 2 Railw. Ca. 95; 12 L. J. (N. S.) 540.
Ch. 112; 7 Jur. 29.

(2) *Gutteridge v. Fletcher*, 13 W. R.

(3) *Thornton v. Finch*, 4 Giff. 515.

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surplus upon
sale under
power—to
mortgagor.

Mortgagee re-
strained exer-
cising power
of sale—not
having given
an agreed
notice to deter-
mine the
trusts of a deed
indorsed on
the mortgage.

The Court
upon an alle-
gation of a
breach of trust
—and no
answer by
mortgagee—
restrained sale
until answer
or further
order.

Assignee of
mortgagee is
in same posi-
tion as mort-
gagee—Every
mortgagee is
charged with
duty of recon-
veyance upon
payment of
money due.

The mortgage
debt cannot
be severed
from the secu-
rity, and pend-
ing suit to
redeem an
action on a
collateral
security was
restrained.

25. Where, by a deed of arrangement, indorsed upon a mortgage deed, which contained the usual power of sale upon notice, the mortgagee was appointed receiver of the mortgaged premises, without prejudice to his rights and powers under the mortgage deed; and it provided, that upon the mortgagee giving three months' notice to the mortgagor to put an end to the trusts, he should be at liberty to exercise the power of sale and other powers contained in the mortgage deed; upon motion, the mortgagee was restrained from exercising his power of sale, he not having given notice to determine the trusts of the deed of arrangement (1).

26. On a bill by a mortgagor to restrain a mortgagee from enforcing his power of sale under the mortgage-deed, and where no answer had been put in, but it was alleged by the bill that a breach of trust had been committed by the mortgagee, the Court, on motion, granted an injunction until the filing of the answer or further order. (2)

27. The assignee of a mortgagee cannot stand in any different character, or hold any different position, from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment; and it is also clear that every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage, and that every mortgagee is charged with the duty of making such reconveyance upon such payment being made. This, indeed, being no more than the necessary result of the relative positions of the parties, the mortgage being only a security for the debt. Where, therefore, a mortgagee, having besides the property mortgaged certain promissory notes made by the mortgagor as collateral security for his debt, transferred the mortgage without assigning the collateral securities, it was held, that he was not entitled to sever the debt from the security; and an injunction granted against his proceeding at Law to recover the amount of one of his notes, pending a suit instituted by the mortgagor to redeem and to settle the equities of the parties, was sustained. (3)

28. A mortgagee will be restrained by injunction from pro-

(1) *Gill v. Newton*, 12 Jur. (N. S.) 220. (2) *Merest v. Murray*, 14 L. T. (N. S.) 321.

(3) *Walker v. Jones*, Law Rep. 1 P. C. 50.

ceeding at Law to sell the equity of redemption (1). So, where property was under mortgage to its full value, a subsequent judgment creditor was restrained by injunction from selling the premises, and the mortgagees were ordered to foreclose with all possible despatch (2). A mortgagee will be enjoined against a sale under a power in the mortgage, where the homestead right is not released (3).

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Mortgagee restrained selling under a power where homestead not released.

29. An injunction should be granted, until a hearing, to restrain the sale of lands and farming-stock alleged to be conveyed to the defendant by a deed absolute on its face, but intended only as a mortgage, and put in its present form through his fraud and oppression. The answer denied the fraud, and any agreement for redemption, but contained admissions which, taken in connection with the bill, furnished probable ground of belief in the plaintiff's allegations (4).

Interlocutory injunction granted to restrain sale of lands and farming stock conveyed by a deed absolute in form, but alleged to be intended as a mortgage only.

30. An injunction will not be granted to restrain a mortgagee where he advertises the mortgaged property for sale, "to the full extent of the powers derived to or by him under and by virtue of" the mortgage deed, "and not otherwise" (5).

31. Where a conveyance of land is obtained without deception, but upon a verbal promise subsequently to secure the purchase-money by a mortgage, which the grantee afterwards refuses to do, this will not constitute a sufficient ground for enjoining him from selling the land (6).

A verbal promise subsequent to conveyance to secure purchase-money by mortgage, not sufficient to enjoin sale by grantee.

32. An injunction to stay sale, under a power in a mortgage, was granted a few days before the expiration of the notice of sale, on a bill by the mortgagor, charging a parol agreement enlarging the time of payment, and that payments had been made on the mortgage which were not credited. After answer, admitting some of the payments, but denying the agreement charged, the injunction was dissolved, on the terms of giving six weeks' further notice of the sale, and a reference to a Master was ordered to ascertain the sum due (7).

(1) *Severns v. Woolston*, 3 Green, Ch. 220 (Amr.).

(2) *Duncan v. Edwards*, 4 Allen, 369 (Amr.).

(3) *Boyd v. Cudlerback*, 31 Ill. 113 (Amr.).

(4) *Peeler v. Barringer*, 1 Wins. (N. C.) No. 2 (Eq.) 5 (Amr.).

(5) *York, &c., v. Myers*, 41 Maine, 109 (Amr.).

(6) *Ellsworth v. Starbird*, 32 Maine, 176 (Amr.).

(7) *Nichols v. Wilson*, 4 John, Ch. 115 (Amr.); Hilliard, Inj., 2nd Ed., pp. 594, 595, 605, 611.

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In Equity property is alienated without a formal conveyance.

A contract to transfer passes the property, and vendor is trustee for vendee or mortgagee—and such contract may be applied to future acquired property.

No injunction where there is a mistake by each party as to subject matter of the contract.

No injunction to restrain breach of covenant which is too vague, and in nature of covenant to repair.

1. In Equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance, and a contract to transfer the property given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee. This rule applies to personal property as well as to real estate, and such a contract, if made with respect to the sale or mortgage of future acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal; and it was held in the case of *Holroyd v. Marshall* (1), that though there had been no *novus actus interveniens*, the title of an equitable mortgagee of machinery in a mill, and any substituted machinery, was preferable to that of a creditor under an execution put in subsequently to the last transaction by which the equitable mortgage was perfected, as well to the new as to the old machinery (2).

2. In a case of mistake, where the plaintiff intended to buy what the defendant never intended to sell, the Master of the Rolls, on the ground of the mistake, refused a mandatory injunction as to certain underground pipes, to restrain their removal, in a piece of land in respect of which the mistake arose, and as neither party had any right to require the specific performance of the agreement, dismissed the bill without costs (3).

3. The Court will not decree the specific performance of a covenant that is too vague, and in the nature of a covenant to repair, and therefore an injunction was refused to restrain a party from destroying a hedge, and from erecting a wall, or any building inconsistent with a hedge being maintained for the benefit and advantage of the lands demised; so held, in a case where upon granting a lease a hedge and a space of five feet on other lands of the lessor adjacent to the boundary of the demised lands were marked on the map in the margin of the lease with a note, "This

(1) *Infra*.

(2) *Holroyd v. Marshall*, 10 H. L. C. 191.

(3) *Butterworth v. Walker*, 13 W. R. 168; 11 L. T. (N. S.) 436.

ledge to be maintained by the grantor," which note was not signed or incorporated by a reference in the lease (1).

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4. A vendor is not entitled to an injunction to restrain a purchaser from buying another estate, on the ground that it will incapacitate him from completing his first purchase (2).

No injunction to restrain vendee purchasing another estate.

5. The fact that a contract has been entered into for the purchase of land is not sufficient to entitle the purchaser, before the title has been accepted, to an injunction restraining the vendor from using or continuing to use the external wall of the building, the subject of the contract, as a party wall, or from encroaching on the land, or from building so as to obstruct the light or air coming to the premises contracted to be purchased. The Vice-Chancellor said, that not accepting the title, the purchaser said, in effect, that he did not pledge himself to accept a conveyance, and that that was fatal to the motion (3).

No injunction in respect of the subject matter of the contract, before title accepted.

6. In 1845 an owner of two adjoining tenements, a dock and a wharf, sold the wharf in fee without any reservation. The owner had been in the habit of allowing the bowsprits of ships in his dock to project over his wharf; it not being shewn that there was any existing easement of this kind prior to the unity of possession, which ended in 1845, and as this was held to be neither a continuous nor an apparent easement, the Court decided that a subsequent purchaser of the dock was not entitled to restrain a grantee of the purchaser of the wharf from interfering with his use of the dock in the manner above mentioned; in other words, that the dock-owner could not exercise any right of placing ships in the dock in such a manner as that their bowsprits should overhang the wharf; and it was also held, if a purchaser buys the fee simple of a tenement for a valuable consideration, and has it conveyed to him without any reservation, he is not bound to take notice of the manner in which the tenement has, prior to the sale, been used by the vendor for the convenience of the adjoining tenement, on the principle that a grantor cannot derogate from his own grant; and when a purchaser buys a house, and has it conveyed to him with-

No injunction to restrain an easement (bowsprits over wharfs) not existing prior to unity of possession of the two tenements (dominant and servient) and not continuous or apparent.

Purchaser of fee—grantee without reservation—not bound to notice manner vendor used tenement for convenience of adjoining tenement, for grantor cannot derogate from his grant.

(1) *Armstrong v. Courtenay*, 15 Ir. Ch. Rep. 188.

Brewery Company (Limited), 13 W. R. 220.

(2) *Syers v. Brighton Brewery Company (Limited)*, *Wright v. Brighton*

(3) *Heath v. Maydew*, 11 L. T. (N. S.) 473; 13 W. R. 199.

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No injunction to restrain obstructing trustees of composition deed completing a contract of a personal character, (here) the building of a chapel, &c.

out any reservation, he takes the house, not "such as it is," but such as it is described in the particulars of sale, and conveyed by the deed (1).

7. If a contract contains (as in this case) obligations of a personal character, the trustees of a composition deed for the benefit of creditors of the contractor, under the 192nd section of the Bankruptcy Act of 1861, and in the form prescribed, and duly registered, are not at liberty to adopt the contract; so held by Vice-Chancellor Sir J. Stuart in a case where a contractor had entered into an agreement that he, "his executors and administrators" (omitting "assigns") would execute the works (a chapel, class-rooms, &c.)—that is to say, would complete the buildings—at a certain time, in a certain specified manner, and that the contractor was to set out the works and be responsible for errors, to provide and employ workmen, to provide and keep at the building a competent general foreman, to provide materials, labour, &c.; and the Vice-Chancellor refused an injunction to restrain any obstruction to the plaintiffs (the trustees of the deed) in the execution of the works (2).

No specific performance if Court cannot secure performance by plaintiff.

If on non-performance by plaintiff, both parties have not equal justice (in absence of a negative covenant, and where contract cannot be split, and negative part enforced) no injunction to restrain acts inconsistent with the contract.

8. Where the terms of a contract are such that the Court cannot superintend so as to secure the performance by a plaintiff on his part, it will not decree specific performance; and if, on non-performance by a plaintiff, both parties cannot have equal justice, it will not, in the absence of an express negative covenant, and where the contract cannot be split into two separate and independent portions, and the negative part enforced, grant an injunction to restrain acts the doing of which is inconsistent with the maintenance of the contract (3). In this case the directors of a railway company, by their duly authorized agent, entered into a contract with B., a railway contractor, for the construction of their line at a certain price, payable in shares and debentures of the company. The directors subsequently repudiated the contract (denying the authority of their agent), and entered into an agreement by which another railway company was to undertake the

(1) *Suffield v. Brown*, 10 Jur. (N. S.) 727; 10 L. T. (N. S.) 90.

111; 33 L. J. (Ch.) 249; 12 W. R. 356; 9 L. T. (N. S.) 827.

(2) *Knight v. Burgess*, 33 L. J. (Ch.)

(3) *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Company*, 11 W. R. 874; 9 L. T. (N. S.) 227.

construction of the line. Thereupon B. filed his bill to obtain specific performance of his contract, and moved to restrain the directors from parting with the shares which would have become applicable for his payment. But Vice-Chancellor Sir W. P. Wood held, that the contract could not be severed, and that as the positive relief of enforcing specific performance of the contract for construction of the line could not be granted, the defendants could not be negatively restrained from parting with the shares (forming the consideration to B.) in violation of the contract, especially as, in the event of B. failing in his contract, the company could not be restored to their original position (1). And the Court will not entertain a bill for specific performance of an agreement which contains terms that cannot be enforced against the plaintiff, where the effect of a decree would be, that on the plaintiff refusing to perform his part of the contract the defendant could not be restored to his former position; and where the plaintiff, being owner of certain patents, had entered into a written agreement with other persons to form a company for working these patents, he agreeing on his part to sell the patents in foreign countries, and to give his whole services to the company for two years, and to do his best to improve the invention, and to impart such improvements to the company; Vice-Chancellor Sir W. P. Wood held, that the plaintiff could not obtain specific performance of this agreement against his co-promoters, because from the nature of his own part of the agreement the Court could not compel specific performance of it by him; and the difference in the cases where a negative term of an agreement has been enforced by injunction, although the rest of the agreement could not have been specifically performed in Equity, is, that the Court could at any time, upon a breach of any other term in the agreement, restore the parties to their former position, or nearly so, by dissolving the injunction; but if, in such a case as the above, the Court were to compel the defendants to become a registered company, that could not afterwards be undone, if the plaintiff were to fail in his part of the agreement; and the ground upon which a

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Negative terms of an agreement are enforced by injunction—though the rest could not be enforced—where the Court could, upon breach of any other term, restore parties to former position by dissolving the injunction.

(1) And see the observations of the Vice-Chancellor in this case, on *Lumley v. Wagner*, 1 De G. M. & G. 604; *De Mattos v. Gibson*, 4 De G. & J. 276; and *Webster v. Dillon*, 3 Jur. (N. S.) 432; 5 W. R. 867.

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An actor restrained performing at any other theatre than that which he had agreed to perform in.

A singer restrained singing, in violation of the negative stipulation of the contract, at any other theatre than the one she had agreed to sing at; though the positive stipulation could not be enforced.

Court of Equity goes in enforcing by injunction a negative term in an agreement, the positive terms in which cannot be enforced by decree for specific performance, is, that the injunction is dependent upon the plaintiff's performing his part of the contract, and will be dissolved on his failing to do so (1). Where the defendant, an actor, had contracted with the manager of a theatre to play at his theatre for twelve consecutive nights, commencing on a certain day, stipulating that he should be at liberty during those nights to perform (among other characters) three which were named, but there was no express condition that he should not act elsewhere during the twelve nights, and on the approach of the day appointed for commencing the engagement the defendant declared that he would only act in a piece which could not be produced at the theatre, and, when told that was impossible, declared that he would not act at all, and advertised himself to act at another theatre on the night appointed for the commencement of his engagement; Vice-Chancellor Sir W. P. Wood held, that an injunction might be granted to prevent the defendant acting during the twelve nights at any other theatre during the ordinary hours at which the theatre was opened for public performance (2). Where a lady, not of age, and her father, by writing signed in a foreign country, had agreed with a theatrical manager to sing at his theatre for a definite period, and by a clause, subsequently acceded to and signed by her agent, and to which she and her father afterwards assented, she engaged "not to use her talents at any other theatre, nor in any concert or re-union, public or private, without the written authorization of" the manager, and the lady engaged with the manager of a rival theatre to sing at his theatre within the definite period, and her *début* was announced in the usual public advertisements; upon a motion, in a suit by the manager against the lady, her father, and the manager of the rival theatre, although it was objected that the positive and negative terms formed but one agreement, and that, as it had been settled that the Court could not by injunction enforce the positive term that the lady should sing, it could not enforce the negative stipulation, yet the Lord Chancellor (Lord St. Leonards)

(1) *Stocker v. Wedderburn*, 3 K. & J. 393; 26 L. J. (Ch.) 713. (2) *Webster v. Dillon*, 3 Jur. (N. S.) 432; 5 W. R. 867.

(affirming the decision of Vice-Chancellor Sir J. Parker) held, that the positive and negative stipulations of the agreement formed but one contract, and that the Court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract; and, overruling *Kemble v. Kean* (1), and *Kimberley v. Jennings* (2) (3), that the Court would prevent the violation of the negative term, and restrain the lady from singing at the rival theatre, though the positive term of the agreement could not be enforced; and also that, although it was a foreign contract, the plaintiff was entitled to the injunction without reference to where the contract was entered into, or what might be the remedies or forms of procedure in other countries on it (4). In *Rolfe v. Rolfe* (5) it was held, that if an agreement consists of two distinct parts, one of which the Court can enforce, but not the other, and a bill is filed simply for an injunction to restrain the violation of the former part, the Court will grant the injunction, notwithstanding it would not enforce the agreement *in toto*.

9. The Court will not specifically enforce an agreement which would be a fraud on the public; and where J. sold under a trade-mark a medicine known as J.'s ointment; and O., without authority, sold an ointment as J.'s ointment, under an imitation of J.'s label; and J. having threatened proceedings against O., an agreement was made by which, after reciting that O. alleged that his invasion of the rights of J. was inadvertent, and that he had discontinued the same, and agreed not again to infringe on such rights; all claims in respect of the invasion, not only with respect

The Court will not enforce an agreement which would be a fraud on the public.

(1) 6 Sim. 333.

(2) 6 Sim. 340.

(3) In *Kimberley v. Jennings* it had been held by Vice-Chancellor Sir L. Shadwell, that where a party agrees not to do a particular act, and there are other terms in the agreement which are so vague that the Court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term; and in *Kemble v. Kean*, a case in which the proprietors of Covent Garden Theatre had agreed with an actor that he should act for twenty-four nights, during a certain

period of time, at their theatre, and that in the meantime he should not act at any other place in London; the same judge held, that the Court could not enforce the positive part of the contract, and, therefore, that it would not restrain by injunction a breach of the negative part.

(4) *Lumley v. Wagner*, 5 De G. & Sm. 485; 1 De G. M. & G. 604; *et v. Great Northern Railway Company v. Manchester, Sheffield, and Lincolnshire Railway Company*, 5 De G. & Sm. 138.

(5) 15 Sim. 88; 1 Coop. C. C. 87, n.

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to O., but to include all parties who might have purchased the ointment from him, should be settled and discharged by the payment of £1000, the receipt of which was acknowledged; and this agreement also contained an undertaking to execute a formal release of all claims and demands in respect of the infringement, and J. having commenced suits against persons who had purchased the ointment from O. previously to the agreement, but retailed it afterwards, and O. filed a petition specifically to enforce the agreement, and to restrain J. from proceeding in the suits against the purchasers from O.; the Court held, first, that the agreement did not authorize any sale, after its date, of ointment previously purchased from O.; but, secondly, that, even if the terms of the agreement required the construction that J. was to permit ointment previously purchased from O. to be sold under the initialed mark, the Court would not enforce the agreement on the ground of the fraud on the public (1).

Purchaser for value of bond, without notice that it had been obtained by fraud, not restrained from dealing with it.

10. In *Ashwin v. Burton* (2) it was held that a purchaser of a bond for value, without notice, could not be restrained from dealing with the bond which had been transferred to him as a security for the debt of a party (T.), to himself, to whom, i.e. to T. (who, though never admitted, alleged himself to be a solicitor), and the solicitor for the vendor, the purchaser of an estate, on signing the contract, had assigned and delivered the bond (a negotiable one) as a deposit, the vendor of the real estate being a fictitious person, and the contract a fraud; and upon the purchaser of the estate filing a bill to get back the bond from the defendant, the purchaser of the bond, the Court also held, that the deposit did not make T., the alleged solicitor, a trustee for the plaintiff.

This Court will, in a suit by vendor, restrain an action by purchaser for the deposit.

11. There is no general rule of practice to the effect that the Court will not, in a suit for specific performance by a vendor, restrain an action by the purchaser to recover the deposit; and where a purchaser of property by private contract had paid his deposit, but considered the title defective, and had brought an action for the recovery of such deposit, and the vendor then filed a bill and moved for an injunction to restrain the action; Vice-Chancellor Sir R. T. Kindersley held, that a Court of Equity was

(1) *Oldham v. James*, 14 Ir. Ch. Rep. 81.

(2) 9 Jur. (N. S.) 319.

the proper tribunal to try a question of title, and that on bringing the deposit into Court, the injunction must be granted (1).

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12. Where T., by agreement in writing not under seal, had agreed to let to P. two farms for a definite term—ten years—at a fixed rent, and P. had agreed to perform certain acts, viz., that he would lead or carry all the materials required for the buildings and drains proposed to be built and made on the farms by T.; and the agreement contained stipulations that new hedges were to be made and planted by T.; that P. should keep them clean and properly protected; and that gates, buildings, “&c.,” should be left in repair by P.; and T. reserved to himself certain customary rights and reservations to cut and plant timber, search for and work mines and minerals, “&c.,” allowing for reasonable damage; and the agreement had been signed by the agent of T. and P., and under it P. had been let into possession of the farms, and the buildings had been commenced by T.; but disputes having arisen as to the leading or carrying of the stones by the tenant, the building operations had been stopped; and in 1857 T. had brought ejectment to recover possession of the farms, and P. filed a bill for specific performance, and for an injunction to restrain the action of ejectment; the Lord Chancellor, affirming a decision of Vice-Chancellor Sir J. Stuart, held, inasmuch as the subject matters, the term and the rent, were certain, the uncertainties in the subsidiary part of the agreement, even in the use of the expression “&c.,” were not sufficient to prevent the tenant from having the agreement specifically performed (2); and also that the agreement, though void at Law as a lease, under the 8 & 9 Vict. c. 106, s. 3, which enacts that every lease required by law to be in writing shall be void at Law unless made by deed, was valid as an agreement, and that the jurisdiction of the Court was not excluded by this statute; and the Court directed specific performance of the agreement.

If subject matters of contract certain, uncertainties in subsidiary parts, will not prevent specific performance.

An agreement void at Law as a lease may be valid as an agreement.

13. Where there had been a verbal agreement for a lease of a farm, at a certain rent, for a certain term, upon which the plaintiff was let into possession as tenant, and afterwards paid for the stock according to valuation, and there was evidence that the defendant, after the parol agreement, and after letting the plaintiff into pos-

Ejectment restrained, and specific performance decreed of verbal agreement for lease at a certain

(1) *Kell v. Nokes*, 32 L. J. (Ch.)

(2) *Parker v. Tuswell*, 4 Jur. (N. S.)

785.

183, 1006; 27 L. J. (N. S.) (Ch.) 812.

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rent and term,
and plaintiff
let into pos-
session.

session of the farm, gave a memorandum of the terms of the agreement, unsigned, to a solicitor, and desired him to prepare a deed according to the memorandum, and to let it be a favourable lease to the defendant; the Lords Justices, affirming a decision of Vice-Chancellor Sir J. Stuart, held, that this was sufficient to entitle the plaintiff to restrain an action of ejectment, and to a decree for a lease according to the parol agreement (1).

Proof of acts
amounting to
breach of
ordinary cove-
nants must
be clear—and
the breaches
gross and not
waived—to
disentitle to specific performance.

14. Where specific performance of an agreement for a lease is refused, on the ground of waste, or acts amounting to breach of ordinary covenants in a lease, the defence can only prevail on clear evidence of gross breaches of the covenant, without any waiver or acquiescence by the landlord (2).

Specific per-
formance
decreed upon
purchase by
wife for hus-
band, and pos-
session by
husband.

15. Where the plaintiff's wife, without his knowledge, had paid £150 to the defendant, with the desire of purchasing a field for the plaintiff, and the defendant refused to sell, but kept the money and paid no interest, and a few days afterwards he told the plaintiff he might have the field to put his horse in, and the plaintiff occupied it for ten years without paying any rent, and in ignorance of what his wife had done; the Master of the Rolls, upon a bill for specific performance and to restrain an action of ejectment, held, that there was a contract which the Court would decree to be specifically performed, the plaintiff having on an interlocutory motion for an injunction being ordered by Vice-Chancellor Sir J. Stuart to give judgment in the action, to be dealt with as the Court should direct (3).

16. Where the original agreement has been subsequently varied, unless there be certainty as to those variations as affecting the original agreement, so that both together should form one consistent agreement, the jurisdiction of specific performance cannot be applied to such a case, and the right to an injunction must depend on the right to specific performance, and an injunction to restrain the defendants from bringing ejectment, and from preventing the plaintiff's occupying stalls and counters, &c., was, under the above circumstances, refused (4).

Breaches of a

17. Where a contract had been entered into between a canal

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| (1) <i>Pain v. Coombs</i> , 3 Sm. & Giff. (N. S.) 1167; 13 W. R. 125. | (4) <i>Paris Chocolate Company v. Crystal Palace Company</i> , 3 Sm. & Giff. 119. |
| 449; 3 Jur. (N. S.) 307; 1 De G. & J. 24. | |
| (2) <i>Ib.</i> | |
| (3) <i>Millard v. Harvey</i> , 10 Jur. | |

company and the plaintiffs, the owners of paper mills, as to the mode of enjoyment of the waters by which both were supplied, and the company did acts in violation of the contract; the Master of the Rolls held, that it was no answer, upon a bill for a perpetual injunction, to say that the acts proposed would not be injurious, or even to prove that they were beneficial to the plaintiffs, and the Court, although no evidence was given of any actual damage done, made a decree for a perpetual injunction (1).

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contract as to the mode of enjoyment of waters, restrained—it is no answer that the acts were not injurious—or even if they were beneficial.

18. In the case of an agreement between railway companies, the terms of which it was contended were uncertain in themselves, and the plaintiff's legal title was doubtful, the Court of Appeal, dissolving an injunction obtained in the Court below, gave the parties seeking to enforce the agreement an opportunity of trying these questions at Law, and refused to restrain in the meantime an alleged violation, an injunction not being required for the protection of the plaintiff against irremediable mischief, and would be injurious to the defendants (2).

No injunction to restrain alleged violation of an agreement between two railway companies—plaintiff's legal title being doubtful.

19. Where upon an application for an injunction to restrain the breach of an agreement, the Court ordered the motion to stand over, with liberty for the plaintiff to take proceedings at Law, and the plaintiff thereupon brought his action, and recovered a sum of £500 by way of liquidated damages, and then renewed his application for an injunction; Lord Chan. Cottenham, under these circumstances, refused to interfere, the Lord Chancellor observing that the Court of Law had determined that the word "penalty" in the agreement meant liquidated damages, and that, therefore, there was no right of action then remaining; and inquired whether counsel had any authority to shew that this Court would interfere under such circumstances, the agreement being a legal one, and the contract then no longer continuing; and that it came, in fact, to this—that after the defendant had paid the price of doing the act the Court was asked to restrain him from doing that act for which he had paid, and the Lord Chancellor afterwards added that the counsel for the plaintiff had produced no authority in support of such a proposition (3).

No injunction to restrain breach of agreement where a Court of Common Law has determined word "penalty" meant liquidated damages, and plaintiff has recovered a sum by way of liquidated damages.

(1) *Dickenson v. Grand Junction Canal Company*, 15 Beav. 260.

North Western Railway Company, 3 Mac. & G. 70.

(2) *Shrewsbury and Birmingham Railway Company v. London and*

(3) *Saintier v. Ferguson*, 1 Mac. & G. 266; 1 H. & T. 383.

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Specific performance of a contract of hiring and service will not be enforced, and no injunction to restrain excluding from management. And so of an agreement for continuance of plaintiff's personal service.

20. Where by an indenture between the plaintiff of the one part, and the defendants, who were partners in a certain manufacture of which the plaintiff had been the patentee, of the other part, it was stipulated that the plaintiff should have the conduct and management of the business, and that the remuneration which he should receive in respect of his services should be such a sum of money as would be equal to 40 per cent. upon the net profits; that a reduced amount should be paid to his executors in the event of his death, until the expiration of the license; that the plaintiff might purchase the business on certain terms; that the defendants might determine the plaintiff's engagement as manager, if he should not in every respect perform the covenants contained in the indenture, but that so long as he continued to observe them his appointment as manager should be irrevocable during the continuance of the license, and that nothing therein contained should extend to constitute a partnership; the Lord Chancellor (Lord Truro), held, there being an absence of every incident of partnership except that of sharing in the profits, that that circumstance alone did not constitute the indenture a contract of partnership, but that it amounted only to a contract of hiring and service; and the plaintiff having been dismissed by the defendants from their service, and having filed his bill for an injunction to restrain the defendants from excluding him from the management, the Lord Chancellor also held, discharging the injunction which had been granted by Vice-Chancellor Lord Cranworth, that the contract being of hiring and service was one of which specific performance could not be enforced (1); nor can a suit be sustained which seeks to enforce an agreement for the continuance of the plaintiff's duties or personal services to the defendant, inasmuch as those services might be rendered in a manner productive of injury rather than benefit to the latter, and the Court does not possess the means of compelling a person to fulfil his duty to his employer under such a contract. Therefore, where it was agreed that the respondent should "continue to employ the petitioner as salesman" for the purpose of disposing of his stock in trade on certain terms, some of which tended to shew that a sale of that stock to the petitioner was thereby intended, but others positively shewed that a relation approaching to that of shopman

(1) *Storker v. Brocklebank*, 3 Mac. & G. 250.

and owner were for a time to exist between the parties, a petition (in Ireland) praying that the agreement might be specifically performed and carried into execution was dismissed (1); and, *semble*, that *vice versâ*, the employer could not have maintained a suit to oblige the other party to discharge his duty according to the agreement (2); and in *Mair v. Himalayan Tea Company, Limited* (3), it was held by Vice-Chancellor Sir W. P. Wood that in the case of a contract for personal service, even when an agent has been wrongfully dismissed by his employers, the Court, having no power to compel the agent to fulfil his duties, cannot interfere by way of injunction in his favour.

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In contracts for personal services Court cannot enjoin even when an agent has been wrongfully dismissed.

21. Where the lessee of an inn covenanted to use and keep it open as an inn during the term, and not to do any act whereby the licenses might become forfeited; and the lessee having threatened to do certain acts inconsistent with the first branch of the covenant, and the lessor having obtained an *ex parte* injunction restraining him from discontinuing to use and keep open the premises as an inn, and from doing any act whereby the license might become forfeited or be refused, the injunction was afterwards dissolved; Vice-Chancellor Sir L. Shadwell holding, that the Court had no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same in effect as ordering him to carry on the business of an innkeeper; but that it might have restrained him from doing, or causing or permitting to be done, any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises; but that no intention had been shewn on the part of the defendant to violate the negative part of the covenant, *i.e.*, not to do any act whereby the licenses might become forfeited or refused (4).

Court has no jurisdiction to restrain discontinuing to use premises as an inn. But might restrain covenantor permitting any act which would have disabled him from carrying on the business.

22. Where by an agreement between the plaintiffs and the defendants, the former, in consideration of certain payments to be made by them to the latter, were to have the exclusive right of engraving and publishing a series of maps, from drawings to be furnished to them from time to time by the latter, the Court refused to restrain the defendants from acting in violation of the agreement,

(1) *Fitzpatrick v. Nolan*, 1 Ir. Ch. Rep. 671.

(3) 11 Jur. (N. S.) 1013.

(4) *Hooper v. Brodrick*, 11 Sim. 47.

(2) *Ib.*

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Court cannot
enjoin furnish-
ing drawings.

No specific
performance
of agreement
to write re-
ports for a
certain
publisher.

No injunction
to restrain per-
mitting re-
ports to be
published by
another pub-
lisher.

If principal
portion of
agreement
cannot be
specifically
enforced, no
relief in re-
spect of a
negative
clause merely
incidental to
the general
relief—unless
the agree-
ment in other
respects is
subsisting.

as it could not compel the defendants to furnish the drawings, and therefore could not decree a specific performance of the agreement (1).

23. In *Clarke v. Price* (2) the Court refused specific performance of an agreement whereby the defendant had agreed to compose and write reports of cases determined in a Court of Justice—to be printed and published by the plaintiff—for a stipulated remuneration, but had entered into no covenant that he would not write for any other publisher. The Court refused, to interfere by injunction to restrain the defendant from permitting reports written by him under an agreement with another publisher to be published by that publisher. Lord Eldon said he had no jurisdiction to compel the defendant to attend the Court to take notes of cases, and could not therefore indirectly compel him, by restraining him from publishing unless he employed the plaintiff as his publisher (3).

24. When the principal portion of an agreement is incapable of specific enforcement by the Court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained, which is merely incidental to the general relief sought, although such clause might have been enforced had it stood alone, or had the agreement been in other respects still subsisting and undisputed (4). This was a bill for specific performance of an agreement to employ the plaintiff as ship and insurance broker, alleging, amongst other things, that the company had recently issued advertisements in which the plaintiff's name did not appear, directing the public to apply for freights, &c. to A. B., the managing agents of the company; and asking for an injunction to restrain the company from issuing any advertisement not containing the name of the plaintiff in the manner stipulated for by the agreement; Vice-Chancellor Sir W. P. Wood said, the Court could not compel the defendants to advertise as their agent a person whom they did not employ as agent, the principal being gone the adjunct must fall along with it; and that *Lumley v. Wagner* (5) was the converse case, and that in that case the

(1) *Baldwin v. Society for the Diffu-
sion of Useful Knowledge*, 9 Sim. 393.

(2) 2 Wils. 157.

(3) *Ib.*

(4) *Brett v. East India and London
Shipping Company*, 2 H. & M. 404.

(5) 1 De G. M. & G. 604.

contract was still subsisting, and Middle. Wagner broke a negative term of it, and a demurrer was allowed to the bill, with costs.

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25. Where the landlord of a workshop, which he held under a lease, agreed in writing to underlet it at a yearly rent, with an option to the tenant to take an underlease upon the same terms for twenty-one years from the previous Lady Day; and the tenant continued in possession under this agreement for four years, when he received notice to quit, and he then applied to his landlord for a lease for twenty-one years according to the agreement; and some months afterwards the landlord obtained possession of the premises under a warrant of possession from a district Court; and the tenant filed a bill against the landlord for specific performance and an injunction; and it appeared at the hearing that the tenant had not kept the premises in repair; the Court dismissed the bill with costs, and expressed a doubt whether the plaintiff had not, by his delay alone, lost his option to renew (1).

Tenant with an agreement from landlord (a leasee) for a sub-lease not entitled to relief—not having kept premises in repair.

26. Where a bill was filed by a person in possession of certain lands for the specific performance of an alleged parol agreement to grant him a lease for seven years, and for an injunction to restrain an ejectment; and the defendant by his answer admitted that he had been disposed to permit, and would have permitted, the plaintiff, if he had been satisfied with his conduct, to remain in possession for the time and on the terms alleged to have been specified in the supposed agreement, and that the plaintiff probably expected to remain in possession for that time and on those terms; but he expressly denied that any such agreement had been made, and insisted that the plaintiff was tenant only from year to year, and had done many acts which would have been breaches of the covenants of the lease supposed to have been contracted; the Court upon this answer refused to make the order *nisi* to dissolve the injunction absolute. The Lord Chancellor (Lord Eldon) said he thought there was more in the transaction than mere understanding between the parties, and that it seemed to him by no means clear that a case might not be made out at the hearing which would exclude the Statute of Frauds, and continued the injunction upon the plaintiff agreeing to give judgment in the ejectment, to undertake to bring no writ of error, and to abide such order with respect to

If it is not clear that a case cannot be made to exclude the Statute of Frauds the injunction will be continued.

(1) *Nunn v. Truscott*, 3 De G. & Sm. 304.

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An erroneous allegation of title as tenant in tail (being only tenant for life) not sufficient (here) to prevent enforcing an agreement for compromise.

the delivery of the possession as the Court might think fit to direct (1).

27. Where a tenant for life of a coal mine filed a bill setting out documents which shewed his title to be that of tenant for life, but by mistake alleging that he was tenant in tail; and the bill prayed to restrain the lessees of a conterminous mine from trespassing upon his mine, and an account and payment of the proceeds of their alleged wrongful workings in it; and after an interim order had been obtained the suit was compromised under an agreement whereby the defendants were to pay the plaintiff £400, which he agreed to accept for the full value of all coals to be raised from the mine in question, with costs to be taxed in the then next term, and if reasonable security to the plaintiff's satisfaction were given six months were to be allowed for the payment; the Court held, that the erroneous allegation of title in the bill could not be regarded as having led to such a misapprehension of it as would prevent a Court of Equity from enforcing the agreement for compromise; and that, under the agreement, the defendants were not entitled to have the plaintiff's title deduced and verified; but that the compromise could not be enforced by petition in the original suit, and that a new suit had been properly instituted for this purpose (2).

Where day for completion extended at vendor's request eleven days—and title not completed—purchaser at liberty to abandon contract.

The Court will restrain a party availing himself of a title arising out of a violation of right, breach of contract or confidence—and the cases where Court refuses interference until legal right established have no application.

28. Where a purchase was to be completed on the 25th of October, and before that day arrived the purchaser, at the vendor's request, extended the time to the 5th of November, and the title, however, was not completed on that day; the Court held, on motion to make absolute an order *nisi* to dissolve an injunction, that the purchaser was at liberty to abandon the contract (3).

29. The Court will interfere by injunction to prevent a party availing himself in any manner of a title arising out of a violation of right, or breach of contract or confidence (4); and the cases in which the Court refuses to interfere by injunction until the legal right is established at Law have no application to cases in which

(1) *Attwood v. Barham*, 2 Russ. 186. 1; affirmed at the hearing, 22 L. J.

(2) *Richardson v. Eyton*, 2 De G. M. (N. S.) Ch. 170; 16 Jur. 959.

& G. 79. (4) *Prince Albert v. Strange*, 1 Mac.

(3) *Parkin v. Thorold*, 2 Sim. (N.S.) & G. 25; S. C. 1 H. & T. 1.

the Court exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right, or breach of contract or confidence (1).

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30. In *Hills v. Oroll* (2) a motion to restrain a defendant from violating his part of an agreement was refused by Lord Lyndhurst, on the ground of the agreement being such that the Court could not compel a specific performance by the plaintiff of his part of it. No injunction to restrain violation by defendant of his part of agreement, if Court cannot compel specific performance by plaintiff of his part.

31. In *Rankin v. Huskisson* (3) the Court granted an injunction to restrain the Commissioners of Woods and Forests from continuing projected, or commencing any other, buildings on part of the site of Carlton Palace, and from permitting such part of the building as had been already erected from remaining thereon until answer or order to the contrary, in violation of one of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site. A mandatory injunction granted on interlocutory motion to restrain acts in violation of a term of a contract.

32. All the proprietors of the M. newspaper being also, with the exception of one, proprietors in the E. newspaper, the Court refused an injunction to restrain using effects of former partnership to assist the latter, in consideration of an annual sum, there having been an agreement permitting the use on those terms which had been long acted under. But an injunction was granted to restrain using effects not included in the agreement (4). Where an agreement had been long acted on for the use of the effects of one partnership by another, injunction refused—except as to effects not included in the agreement.

33. If A. obtains a patent, and enters into an agreement with B., the effect of which is to make B. a partner in the patent, B. is entitled not merely to share in the profits, but to interfere in the management of it; and if, upon a bill being filed, A. insists that he alone is entitled to act in the management, and that such was the true intent of the agreement, an injunction will be granted against A. (5). A patentee, who has, in effect, from the result of an agreement, made another person a partner—will be restrained from acting solely in the management. The Court will not restrain violation of an agreement of which there could be no decree for a specific performance, as, for instance, which there could be no specific performance.

34. The Court will not interfere by injunction to prevent the violation of an agreement of which, from the nature of the subject, there could be no decree for a specific performance, as, for instance, which there could be no specific performance.

(1) *Prince Albert v. Strange*, 1 Mac. & G. 25; S. C. 1 H. & T. 1.

(4) *Glassington v. Thwaites*, 1 S. & S. 124.

(2) 1 Coop. C. C. 84; 2 Ph. 60.

(5) *Blackford v. Hawkins*, 1 L. J. (Ch.) 141.

(3) 4 Sim. 13.

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to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired (1)

35. In *Williams v. Williams* (2) it was doubted by Lord Chancellor Eldon whether a Court of Equity in the exercise of its jurisdiction to decree the specific performance of an agreement, could interfere by injunction to restrain a party from divulging a secret in medicine which was unprotected by patent, and Lord Eldon said that it was a question which would require very great consideration. In this case an injunction which had been granted for that and other purposes was dissolved, upon the affidavit of the defendant (an infant) denying the facts of the case as represented by the plaintiff's affidavit in support of the injunction, and upon the ground that there was no secret in the alleged invention. But

Divulging—in breach of trust — secrets of compounding medicines restrained.

in *Yovatt v. Wingyard* (3), Lord Chancellor Eldon granted an injunction to restrain a defendant from communicating certain recipes for veterinary medicines and vending them, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust and confidence; but confined it so as not to prevent the defendant from administering the medicine to any animals then under a course, it being stated in the papers of directions for administering them, that a sudden discontinuance would be prejudicial; and in *Morison v. Moat* (4) the Court restrained the divulging of a secret of compounding a medicine, in breach of trust and confidence.

Specific performance of an agreement not to ring a church bell enjoined.

36. Where the plaintiffs' house being so near the church that the five o'clock bell rung in the morning disturbed the female plaintiff, the plaintiffs came to an agreement in writing with the churchwardens and inhabitants at a vestry, that the plaintiffs would erect a cupola and clock at the church, and in consideration thereof the five o'clock bell should not be rung in the morning during the lives of the plaintiffs or the survivor of them; the Court held this a good agreement and binding in Equity, and after granting an interlocutory injunction, granted, at the hearing of the cause, an injunction during the lives of the plaintiffs, and the survivor of them, against the ringing of the five o'clock bell (5).

(1) *Newberry v. James*, 2 Mer. 446.

(2) 3 Mer. 157.

(3) 1 J. & W. 394.

(4) 21 L. J. (Ch.) 248; affirming S. C. 9 Hare, 241.

(5) *Martin v. Nutkin*, 2 P. Wms. 266.

37. The Court, in *Spiller v. Spiller* (1), granted an injunction to restrain the vendor of copyhold premises, after delivery of possession, and receipt of part of the purchase-money, from surrendering them to persons other than the purchasers. But Lord Chancellor Eldon said that he wished it to be understood as his opinion that, in general, on a bill for the specific performance of an agreement to sell, the plaintiff is not entitled to restrain the owner from dealing with his property, and that a different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed. In *Echliiff v. Baldwin* (2), the Court granted an injunction restraining a vendor, the defendant to a bill for specific performance, from conveying the legal estate. The ground of the motion being that the plaintiff might be thus put to expense by the necessity of making another party when the cause might be just ready for hearing. And in *Turner v. Wright* (3) the Court granted an injunction in a suit for specific performance to restrain a vendor from letting or selling the estate. In *Curtis v. Marquis of Buckingham* (4) the Court granted an injunction to restrain a sale of an estate till answer to a bill alleging a parol agreement to exchange, partly performed by the plaintiff having purchased an estate for that purpose. And in *Hawes v. James* (5), where an Inclosure Act empowered commissioners to sell by private contract any part of the commonable lands fronting or adjoining the houses or gardens of the purchasers, and also empowered the commissioners to sell by auction such parts at the greatest distance from the houses of the respective proprietors as the commissioners should think fit, for defraying the expenses of the Act, and the surplus of the produce of such sales was directed to be divided among the proprietors; on a bill by one proprietor on behalf of himself and the others, the commissioners were restrained by injunction from proceeding in an agreement made by them for the sale of a pond by private contract to a person who was not the owner of any property adjoining or fronting the pond, it appearing that the pond was of much public utility, and was at an undervalue; and if there are vexatious alienations *pendente lite* the Court will restrain them (6).

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Vendor of copyhold where delivery of possession and receipt of part of purchase-money restrained surrendering to other than purchaser.

And vendor (defendant) restrained conveying :

or letting or selling.

Sale restrained on alleged parol agreement with part performance.

Inclosure Commissioners restrained selling a pond —of public utility—at undervalue.

(1) 3 Sw. 556, 557.

(3) 4 Beav. 40.

(5) 1 Wils. 2.

(2) 16 Ves. 267.

(4) 3 V. & B. 168.

(6) *Daly v. Kelly*, 4 Dow. 440.

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38. In *Green v. Lowes* (1) the Court granted an injunction till answer or further order, against a purchaser, on behalf of a creditor, to restrain payment of the purchase-money to the heir on an affidavit that there was little, if any, other fund for the payment of debts besides the estate.

Alterations in a house under an agreement for a lease restrained, where circumstances of surprise and concealment, &c., would probably prevent specific performance.

39. In *Bonnett v. Sadler* (2) the Court granted an injunction against proceeding with alterations in a house under an agreement for a lease upon circumstances that would probably prevent a specific performance, viz., surprise, the effect of fraudulent misrepresentation and concealment, and the particular nature of the alterations for the conversion of a private house to the purpose of a coachmaker's business, wholly changing the nature of the subject.

If it is doubtful whether a memorandum is a lease, and required to be by deed—or an agreement to let which the Court would specifically execute—the Court will grant an injunction—in aid of bill for specific performance.

40. Where there was a paper entitled "Memorandum of an agreement between A. and B.," and signed by them, expressing that in consideration of £40 A. "doth agree to let," and B. "doth agree to take a messuage," &c., at £40 per annum rent, "and it is further agreed" that A. "shall not raise the rent, nor turn out" B. so long as the rent is duly paid quarterly, and he does not sell any article injurious to A. in his business; though the terms do not exclude the construction of actual demise, yet the import of the whole looking to some future instrument, and a more permanent interest than from year to year; the Lord Chancellor Eldon (observing whether this could be made out at the hearing of the cause was another consideration, but that the case was not so clear that the demurrer ought to be allowed) overruled a demurrer to a bill for specific performance against A., who had succeeded in an ejectment; the Lord Chancellor also observing that the question was, which the paper was, a lease, or an agreement to let, which this Court would specifically execute (3).

The correspondence (here) held so far evidence of an agreement for renewal of a lease that the Court restrained ejectment by lessor.

41. Where in a correspondence between lessor and lessee respecting the granting a new lease to the lessee, the latter having spoken of the renewal of the old lease, the lessor did not object to this expression, but adverted to other topics connected with the subject; on a bill filed for the specific performance of the agree-

(1) 3 Bro. C. C. 217.

(2) 14 Ves. 526.

(3) *Browne v. Warner*, 14 Ves. 156;

injunction upon terms continued on answer, *Id.* 409.

ment for renewal alleged to be contained in these letters, the Court held, that they were so far evidence of such agreement as to warrant the continuance of an injunction against an action of ejectment brought by the lessor against the lessee (1).

42. A plea to a bill for discovery and specific performance, and an injunction of an agreement at Law that the defendant at Law (plaintiff in Equity) would not bring error for delay, or file bill for an injunction, is a bad plea; but the Court, after such an agreement, will not grant an injunction as to that suit (2).

43. In enforcing contracts upon the principle of compensation for variance from description, the Court has gone so far, to the extent even of totally defeating the object of the purchaser, that where the principal subject of the contract was all the corn and hay-tithes of a parish, and of the hay-tithe half was allotted to the vicar, the other half commuted for customary payment—the nature of that payment, the extent of meadow, and the possible conversion from arable, not distinctly appearing; the injunction against the defendant proceeding at Law to recover his deposit made upon an agreement to purchase certain tithes, &c., was continued after answer; and Lord Chancellor Eldon said, that, without meaning to say what might be the final decision, he was of opinion, attending to all the circumstances, that it was too hazardous to say there was not a fair and reasonable question whether this contract might not be specifically executed; that it was certainly to be observed, that under the head of specific performance contracts substantially different from those entered into had been enforced (3).

44. "Where a party has entered into a contract which is still continuing, the Court will not deal with it, so as to prevent any person infringing it, except in certain cases, as in the ordinary case for a specific performance of a contract. There are many cases of contract the breach of which will entitle a party to an action for damages, but will not entitle him to come into a Court of Equity. To the latter class of cases belong all those where the breach of the contract does not produce irreparable mischief; and

(1) *Price v. Assheton*, 1 Y. & Coll. 82. (2) *Auth v. Sambourne*, 4 Bro. C. C. 498.

(3) *Drewe v. Hunson*, 6 Ves. 675.

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though the Court will interfere in a case of irreparable damage, so as to put it in a fair course of trial, yet, unless there is something like that, though parties may be entitled to damages, and large damages too, it is not a ground upon which they can come into a Court of Equity" (*per* Lord Chancellor Eldon) (1).

45. It was formerly held in several cases that relief might be given in Equity against forfeiture (on covenants) where compensation could be made, even although the act or omission were voluntary (2); but this doctrine may be considered now as overruled (3), and relief is only given where the breach of covenant has been the omission of a simple money payment, such as rent (4), unless under very special circumstances (5).

Purchasers of an estate—pending suit for specific performance—directed not to disturb the possession of a party entitled to a lease under an agreement with the vendor.

46. Where a joint stock company established by Act of Parliament vesting in themselves all property belonging to them, and authorizing them to bring actions in the name of their treasurer for the time being, had purchased an estate, pending a suit against the vendors to compel specific performance of an agreement to grant a lease of part; on a bill by the assignees in bankruptcy of the intended lessee against the treasurer and directors, the plaintiffs were declared entitled to a lease, and the treasurer was enjoined from disturbing their possession; but as the rest of the proprietors (being very numerous) were not parties to the suit, Sir T. Plumer, Master of the Rolls, directed that no decree could be made for the execution of a lease (6).

Though bill for specific performance be dismissed, if security has been given for mesne profits, the Court has jurisdiction to order the payment.

47. Where upon a bill for specific performance of an agreement to grant a lease and for an injunction to restrain execution of a *habere*, and on the coming in of the answer, the injunction was continued on the terms of plaintiff's giving security for the mesne rents by recognisance; and on the hearing of the cause the bill was dismissed with costs, and thereupon the defendant brought an action for the mesne rents against the plaintiffs, and recovered judgment at Law; upon motion of the defendant's executor the plaintiffs were ordered to pay the amount of the judgment within

(1) *Weale v. West Middlesex Waterworks Company*, 1 J. & W. 370.

(2) *Popham v. Bampfild*, 1 Vern. 83; *Rose v. Rose*, Amb. 332.

(3) *Hill v. Barclay*, 18 Ves. 56; *Gregory v. Wilson*, 9 Hare, 689.

(4) *Nesbitt v. Tredennick*, 1 B. & B. 29, 47; *Job v. Banister*, 2 K. & J. 382.

(5) *Winthrop v. Murray*, 8 Hare, 214; *Sheurman v. Macgregor*, 11 Hare, 106; *v. Kerr*, Inj. 84.

(6) *Meuz v. Multry*, 2 Sw. 277.

ten sitting days after service of the order ; for notwithstanding the dismissal of the bill, the Court retains jurisdiction to make such an order, the recognisance being substituted, in the case of the plaintiff, for an actual lodgment of the money in Court, in which case the Court, even after the dismissal of the bill, would have jurisdiction to make an order for payment of the money (1).

48. Where A. agreed to demise certain premises to B., who undertook to build houses thereon, at the rate of so many in each year, and A. was to grant separate leases of each house to B. as soon as it was covered in, but if the houses were not built within a specified time A. had a power of re-entry on the demised part of the premises; and B. subsequently contracted with C. for the building of some of the houses, and C. was to have two of them conveyed to him as a payment, A. agreeing by letter to grant to C. such leases as B. would be entitled to under the first-mentioned contract; and C. had fulfilled his contract, but B. had not satisfied the condition of his contract with A., who had in consequence recovered by ejectment the two houses which were to have formed C.'s remuneration; and the bill sought from A. a specific performance of the agreement to grant leases of the two houses to C.; upon a motion for an injunction to restrain A. from granting leases to any person except the plaintiff, the Court held that the plaintiff had no equity against the original lessor; and the only right the plaintiff had was, according to A.'s engagement, to such a lease as that lessee would be entitled to claim (2).

49. Where after an agreement by parol for a partition of copyholds between A. and B. (brothers) having apparent but doubtful title as tenants in common under the will of their father, A., the elder, taking somewhat the larger share, and he afterwards devised his portion to C., and upon A.'s death it was discovered that at the time of the agreement he was tenant in tail and B. tenant in tail in remainder, who thereupon repudiated the agreement and brought ejectment to recover the whole estate; the Master of the Rolls (Lord Langdale) upon the principle on which the Court supports family arrangements, decreed to support the agreement, though by parol, followed by long enjoyment, and that B. should do all acts for

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Upon agreement by original lessor with intended sub-lessee, to grant such a lease as the original lessee was entitled to, intended sub-lessee cannot restrain original lessor making a lease to others of the premises—where original lessee has not satisfied the conditions of his original contract.

Parol agreement for partition by two parties believing themselves to be tenants in common, who were in fact respectively tenant in tail and tenant in tail in remainder, supported on the principle by which the Court supports family arrangements, and long enjoyment.

(1) *Popham v. Baldwin*, 2 Ir. Eq. 357, n.

Rep. 356. See *Costello v. Hunt*, Id. (2) *Anon.* 1 L. J. (Ch.) 25.

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barring the entail, and vesting the portion allotted to A. in his devisee (1).

Vendor may acquire a lien on a fund in Court under a contract for sale, and if vendee refuse to complete, may obtain an injunction to restrain taking out of Court the fund appropriated in part discharge of purchase-money.

50. A vendor may acquire a lien on a fund in Court under a contract for sale, and, if the vendee refuses to complete the contract, may prevent him by injunction from drawing out of Court the fund which was appropriated by the contract to be applied in part discharge of the purchase-money (2).

The circumstances (here) shewing merely a tenancy from year to year, and no title to compel a lease, Equity will not restrain ejectment. *Sed diss. Lord Kingsdown*, agreeing with the Court below, that the landlord having encouraged expectations of an interest—and possession taken with consent and faith of a promise—and with knowledge of landlord money laid out on land—Equity will compel to give effect to the promise.

51. Where A. took and was let into possession of land for the purpose of building according to a plan agreed upon, and at a rent fixed, without any agreement in writing, and without any parol agreement for a lease for a term of years; after which he expended a considerable sum in buildings according to the plan, and continued in possession for several years, and duly paid the rent verbally fixed and the landowner having brought an ejectment, insisting that the plaintiff was mere tenant at will, Vice-Chancellor Sir J. Stuart held, that A. was entitled to an injunction and to relief in Equity (3). The bill prayed in the alternative for a lease or for compensation. A private Act of Parliament having authorized leases for a certain duration, and on certain specified terms, to be granted in cases nearly similar, where there was no written agreement, and it having been the usage on the estate to double the rent when a lease was executed, the Court decreed a lease to A. according to the Act of Parliament and at the double rent (4); but this decree was reversed by the House of Lords. The House (Lord Chancellor Cranworth, Lord Wensleydale, Lord Westbury) holding (*diss. Lord Kingsdown*), that the circumstances of this case did not shew the existence of anything greater than a tenancy from year to year, and did not establish any title to compel the grant of a lease, and, consequently, that the landlord having brought ejectment against T., Equity could neither interfere to compel the grant of a lease nor to stay the ejectment; but, under the special circumstances of the case, the bill was ordered to be dismissed without costs. But (*per Lord Kingsdown*) if a man, under

(1) *Neale v. Neale*, 1 Keen, 672;
affirmed on appeal, *Id.* 684, n.

(2) *Doyne v. Harvey*, 1 Hog. 3.

(3) *Thornton v. Ramsden*, 4 Giff. 519.

(4) *Ib.*

a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation (1).

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52. On a bill for specific performance of a negative contract, or, in the alternative, for damages, the plaintiff having come in time for an injunction as to part, an inquiry as to damages under 21 & 22 Vict. c. 27, was directed in respect of the rest of the contract, the breach of which was complete at the time of filing the bill (2).

53. Where there is a contract for the sale of land, the Court will restrain the owner of the land from dealing with it until a suit for the specific performance of the contract has been disposed of; but when a plaintiff sues for specific performance, and there is a serious question whether any contract exists, the Court will not interpose; and on a motion for an interlocutory injunction, the claim of the plaintiff being doubtful on the evidence, the Court will act upon the consideration of the comparative inconvenience which may arise from granting or withholding the injunction; therefore, where a plaintiff sued for specific performance of a contract for the sale of land, and there was a question whether any contract existed, the Court refused to restrain the owner of the land from dealing with it until the suit for specific performance of the contract had been disposed of; and an injunction to restrain the vendor from reselling the property was dissolved, it not being clear that the purchaser would be able to establish his right to specific performance, and it appearing that the granting the injunction would, in case of his ultimately failing, be more injurious to the vendor than the refusal of it would be to the purchaser, in the event of his ultimately succeeding (3).

Where there is a contract the Court will restrain dealing with the land—but not if there is a serious question whether a contract exists—and the Court will in that case act upon considerations of comparative inconvenience.

(1) *Ramsden v. Dyson and Thornton*, L. R. 1 H. L. 129.

(2) *Hindley v. Emery*, 11 Jur. (N. S.) 874.

(3) *Hudley v. London Bank of Scotland*, 3 De G. J. & S. 63; 11 Jur. (N. S.) 554; 13 W. R. 978.

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No injunction, to restrain act for which damages can be obtained at hearing, and where the contract cannot be enforced as against plaintiff.

In interlocutory applications, if rights of parties are doubtful, Court acts on considerations of comparative injury.

The Court can decree specific performance of an award, although the submission has been made a rule of a Court of Common Law: and, *per* Vice-Chancellor Wood, although plaintiff has endeavoured to set aside the award; but, *per* Lord Chancellor Cranworth, *semble, contra*.

54. The Court will not, by interlocutory injunction, restrain one of the parties to a contract from an act, for which, if wrongful, the plaintiff can obtain compensation in damages at the hearing of the cause, and where the contract is one of which specific performance cannot be decreed as against the plaintiff (1). And where on motion for an interlocutory injunction, the rights of the parties are doubtful on the evidence, the Court will act on the consideration of the comparative injury which may arise from granting or withholding the injunction (2). This was a bill by the plaintiff, who had entered into a contract with the defendants for the construction of a line of railway, praying, amongst other things, for an injunction to restrain the defendants from taking possession of or interfering with the plaintiff in the execution of the works which were being carried on by him under the contract, and from removing from the works any chalk, plant, or materials; and for an account of sums due to the plaintiff under the contract; and an inquiry as to surplus land, chalk, and flints, and for damages. Vice-Chancellor Sir J. Stuart granted an injunction restraining the defendants from interfering with the plaintiff in the execution of the works which were being carried on by him; but the Lords Justices Knight Bruce and Turner, upon appeal, dissolved the injunction without prejudice to any question.

55. The Court of Chancery has jurisdiction to entertain a suit for specific performance of an award, although the submission has been made a rule of a Court of Law. It is no defence to such a suit that the plaintiff has ineffectually endeavoured to set aside the award on motion (3); and where an award directed the execution of a lease to the Plaintiff of certain portions of a railway running over the defendant's land, and provided that the lessor might from time to time require the lessee to supply engine-power during such time as he should keep an engine or engines for use, and twelve months after the date of the award the plaintiff filed a bill for specific performance; Vice-Chancellor Sir W. P. Wood decreed specific performance of so much of the award as related to the

(1) *Garrett v. Banstead and Epsom Downs Railway Company*, 13 W. R. 878.

(2) *Ib.*

(3) *Blackett v. Bates*, 2 H. & M. 610; L. R. 1 Ch. 117; 12 Jur. (N. S.) 151; see 12 Jur. (N. S.) 874, n.

execution of the lease; and by the same decree, after declaring that the defendant was entitled during the continuance of the lease, and during such time as the lessee should keep an engine or engines for use, but not otherwise, to require the lessee to supply engine-power, awarded an injunction to restrain the plaintiff from interfering with the defendant in the enjoyment of his rights and privileges. But upon appeal this decree was reversed, on the ground that the relief was not mutual, inasmuch as specific performance could not be granted of the portion of the award which required the plaintiff to supply engine-power; and specific performance of an award or an agreement cannot be granted unless the Court can give mutual relief to both parties (1). The award was made in June, 1863; a bill for specific performance was filed in July, 1864; the interval was filled up by legal proceedings, which the plaintiff could not accelerate, but whereby he sought to set aside the award; Lord Chancellor Cranworth said that he was disposed to think that such circumstances alone disentitled the plaintiff to specific performance, and that it was a strong thing to say, that after a party has denied the validity of an agreement, and taken proceedings to set it aside, he can, when the result of those proceedings has proved adverse, turn round and insist on specific performance (2).

56. Where A. and B. were tenants of adjoining premises under the same landlord, and A. had a well upon his premises, from which B.'s premises were supplied with water by means of a pipe, and both premises, with others, were put up for sale by auction in lots, one of the conditions being that each lot was subject to all rights of way and water and other easements (if any) subsisting thereon, and A. and B. both purchased the lots of which they had been tenants, and the vendor insisted that A. had purchased subject to B.'s right of water, and A. filed a bill for a specific performance of the contract without any liability to such easement; Vice-Chancellor Sir R. T. Kindersley held, that B. had no easement or right of water, but merely a license from his landlord during his tenancy, and that A. was entitled to the relief asked, namely, specific performance of the contract, and an injunction to restrain

(1) *Blackett v. Bates*, 2 H. & M. 151; see 12 Jur. (N. S.) 874, n. 610; L. R. 1 Ch. 117; 12 Jur. (N. S.) (2) *Ib.*

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Where vendee—having paid the deposit into Court—becomes bankrupt, and his assignees disclaim—there being a good title—the deposit will be paid out to party paying it in, without prejudice to application by vendor to Bankruptcy Court—and proceedings in suit stayed—and no costs to assignees or bankrupt.

The rule that purchaser is bound to inquire into vendor's title applies to tenant from year to year as to his lessor's title—and tenant without express notice of covenant by his lessor, in the original conveyance, not to use buildings for sale of ale, &c., is bound by, and will be restrained from violating, the covenant—and that

the defendant from re-selling the premises, which under the conditions of sale he had advertised to do (1).

57. Where N. contracted to purchase an estate, and a bill was filed against him for specific performance, and he then became bankrupt on his own petition, having prior to his bankruptcy brought an action to recover his deposit, which was restrained on the terms of the deposit being brought into Court, and the assignees were then made parties to the suit, and subsequently disclaimed in respect of the contract, and the usual inquiry was directed as to title, and a good title certified; Vice-Chancellor Sir R. T. Kindersley held, the assignees and bankrupt appearing, that all proceedings in the cause must be stayed, and the deposit paid out to the party paying it in, without prejudice to any application by the vendor to the Bankruptcy Court under the Bankrupt Act of 1849, s. 146; the Court being of opinion that the plaintiff would have been entitled to a decree for specific performance but for the bankruptcy and the assignees disclaiming; and the Vice-Chancellor said, that the only position in which he could place the plaintiff was as if there had been no suit; but he gave no costs to the assignees or the bankrupt, as he said it was according to the usual practice to serve them (2).

58. The rule that a purchaser is bound to inquire into the title of his vendor applies equally to a tenant from year to year in relation to the title of his lessor; therefore where the original conveyance in fee of land contained a covenant by the purchaser for himself, his heirs, executors, and administrators, with the vendors, their heirs and assigns, that no building to be erected on the premises should be used for the sale of ale, beer, wine, or spirits, or any other intoxicating liquor, and a house was built on the land, and a tenant from year to year, holding under a purchaser of the fee, but not having actual or express notice of the covenant, opened a beer-shop on the premises; upon a bill by the original vendors against the purchaser of the fee and the tenant from year to year, the Lords Justices held, affirming the decision of Vice-Chancellor Sir W. P. Wood, that it was the duty of the tenant to have inquired into the title of his lessor, and as he had not made

(1) *Russell v. Harford*, L. R. 2 Eq. 507.

(2) *Kell v. Nokes*, 14 W. R. 908; 14 L. T. (N. S.) 697.

out a case which relieved him from such obligation, an injunction was granted; and that although the covenant might not run with the land the defendant, the tenant from year to year, was bound by it in Equity (1).

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although a
covenant not
running with
the land.

59. Where a company—a sub-purchaser—filed a bill against their vendor (who was a purchaser under another vendor) and some other defendants, who had agreed to share with him, for a return of £75,000, part of the company's purchase-money, and for delivery up, and for an injunction to restrain the negotiation, of bonds given by the company for another part, upon an agreement to sell an estate of 1530 acres, which turned out to be less than 1100 acres, and the contract for the sale of which estate by the original vendor had, on this ground, been rescinded; Lord Chancellor Lord Cairns held, reversing a decision of Vice-Chancellor Sir R. Malins, that although the financial position of the company might render it convenient to them to rescind the contract, and though they might otherwise have been ready to take the smaller quantity of land, they were entitled to rescind the contract as the purchaser was unable to complete with them; and on the ground of misrepresentation, though they might have been able to ascertain the extent of the estate, that the company were entitled to repayment of what they had paid, and to a return of the bonds, and that they had a lien on a portion of a sum of £50,000 deposit on the original contract repaid by the original vendor to his purchaser, the sub-vendor, and which had been paid into Court (2).

60. Where C., the owner of land separated from the sea by a high road and waste land belonging to a corporation, proposed to construct, at his own expense, a terrace walk between his own land and the high road, upon the corporation agreeing to grant him a lease of all the waste lands between his own property and the sea for 300 years at a nominal rent, to reimburse him for his outlay; and in 1860 the corporation passed resolutions accepting the proposal and providing for the stumping out of boundaries by a committee to be appointed, and C. objected to the boundaries proposed by the committee, but took possession of such land as he considered

(1) *Wilson v. Hart*, 2 H. & M. 554; *ens*, L. R. 4 Ch. 101; 18 L. T. (N. S.) L. R. 1 Ch. 463; 35 L. J. (Ch.) 569. 305; 20 L. T. (N. S.) 89; 17 W. R.
(2) *Aberaman Iron Works v. Wick-* 211; L. R. 5 Eq. 485.

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necessary and constructed the terrace; and in 1865 the corporation gave him notice to quit, and in 1869 served him with a summons in ejectment; upon a bill for specific performance of the proposals by the corporation, and praying that a lease might be executed in accordance therewith, and for an injunction to restrain the action in ejectment, upon which a motion for an injunction had stood over on the undertaking of the defendants not to prosecute the proceedings in ejectment; Vice-Chancellor Sir J. Stuart held, on motion for decree, that C. was entitled to a lease of the lands of which he had taken possession, the Court considering the corporation bound by their acquiescence (1).

Purchaser for value not bound by covenant not running with land, unless actual notice, or precautions taken that by proper inquiries he would have had notice.

61. A purchaser for value is not bound by a restrictive covenant framed to run with the land, unless he has actual notice of it, or unless precautions have been taken that if he had made proper inquiries he would necessarily have had notice of it; and where A. conveyed land to B. by one deed, while B., by a separate instrument, entered into a covenant restrictive of its use for a beer-house, and B. sold the land to C. with notice of his covenant (his statement that he had no knowledge of the restriction having been disproved), and C. let it to D. without notice, and D. opened a beer-house upon it; on bill by A. for injunction, Vice-Chancellor Sir W. M. James held, that the Court would grant an injunction against C., but that no relief would be had against the tenant, who if he had asked his lessor would have been told there was no restriction, and if he had seen the conveyance would have found none; and the bill, as against him, was dismissed with costs (2).

No injunction to protect subject matter of suit for, unless plaintiff entitled to, specific performance.

62. Upon a bill for specific performance and for an injunction to protect the subject matter of the contract, the latter will not be granted unless the plaintiff is entitled to such performance (3).

63. In case of a mere agreement to convey, defect of title is a ground for an injunction in favour of the purchaser (4). And though the sale is under a decree, Equity cannot make a man take a title which he is to support by a bill for an injunction (5).

(1) *Crook v. Corporation of Seaford*, 18 W. R. 1147.

(2) *Carter v. Williams*, 18 W. R. 593; L. R. 9 Eq. 678; 39 L. J. (Ch.) 560.

(3) *Geiger v. Green*, 4 Gill. 472 (Amr.)

(4) *Buchanan v. Alwell*, 8 Humph. 516; *Buchanan v. Lorman*, 3 Gill. 51 (Amr.)

(5) *Per Lord Rosslyn, Shaw v. Wright*, 3 Ves. 22.

CHAPTER II.

PERSONAL PROPERTY.

SECT. 1. *Patents.*

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1. Hoops of whalebone, cane, and other substances, suspended from the waist, and forming a petticoat, having long prior to the suit been used by ladies; a person having taken out a patent for using, for the same purpose, hoops made of steel watch-springs, the Master of the Rolls (Sir J. Romilly), upon a motion for an injunction to restrain the infringement, and an application for an issue to try the validity of the patent, held, that this (*i.e.*, the use of steel springs instead of whalebone,) was not an invention which could properly be made the subject of a patent; the Master of the Rolls said there was no invention, nor anything that could be called an invention (1).

2. Where an invention consists of the discovery of particular means for attaining a result, which result is already perfectly well known, the invention is only for the means; and the invention of one set of particular means does not interfere with the invention of another set of means to the same end, provided that the two sets of means are distinct, and the latter does not involve a colourable imitation of the former, or an incorporation of the former, with additions. But ignorance of the existence of a former invention is no answer to a charge of infringement, where the second invention is capable of being accurately represented as an imitation of the former, but where an inventor described his invention as "applicable to certain machines commonly known as self-acting mules, particularly those constructed with the improvements of L. & R.;" and the second inventor having taken the same elements of construction, produced a new combination of agents, arriving at

The invention of one set of means to attain a result, does not interfere with the invention of another set. for the same end.

(1) *Thompson v. James*, 32 Bea. 570.

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A patent for an entire combination is not infringed by a different combination for same object of same elements.

the same result, but by a process of thought in which he did not appear to have derived assistance from his knowledge of the former invention, Lord Chancellor Westbury held, affirming a decision of Vice-Chancellor Sir W. P. Wood, that there was no infringement (1). And a patent for an entire combination is not infringed by a different combination, for the same object, of the same elements, though important, or of equivalents for them, if not a mere colourable evasion or imitation (2). And, *semble*, in considering the question of colourable evasion the Court will look at the novelty of the object of the combination, and of the parts combined (3). And where a plaintiff alleged an infringement of his patent, and the patent was granted in 1854, and specified a combination of mechanism applicable to spinning mules, and the first claim was for the novel construction, combination, and application of mechanism thereinbefore described, whereby one-half of the clutch or catch-box thereinbefore described, or any mechanical equivalent therefor, was connected with or acted upon cams or other similar parts of mechanism direct; and the defendant's patent, granted in 1860, specified a combination of mechanism which embodied the leading idea of the plaintiff's patent, and by which one-half of a clutch-box was made to act upon cams direct; and he adopted some of the elements combined by the plaintiffs, but he disposed them in a different manner; and these were important parts of the prior combination, and though old, the mechanical contrivances were new in respect of the particular mode in which the plaintiff applied them, and the immediate object of their combination by him was new, viz., to make a catch-box on cams direct, and the effect brought about by the direct action of the catch-box on the cams had long previously been produced, but less advantageously, by other contrivances of various kinds, and the defendant's mode of combination effected the common object of each patent in a more beneficial manner than it was or could be effected by the mode of combination specified in the plaintiff's patent, and it displayed an equal amount of inventive genius; the House of Lords, affirming the decision of Lord Chancellor

(1) *Curtis v. Platt*, 11 L. T. (N.S.) 852; L. R. 1 H. L. 337; 10 Jur. 245.

(2) *Curtis v. Platt*; 35 L. J. (Ch.) (3) Ib.

Westbury, held that the plaintiff's claim was limited to the entire combination claimed, as before described in his specification, but that the defendant's combination was not a mere colourable evasion, and that there was no infringement (1).

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3. The defendant in a suit for an infringement of a patent, who relies upon the specification of an anterior patent, as being in anticipation of the plaintiff's patent, and that the same result would be produced by a skilled workman in operating according to that specification, is bound to shew conclusively that the invention protected by the anterior patent was used, or capable of being used, by the means designated by that specification. And it is no ground of proof of the effect of an anterior patent, that scientific persons of the present day, with all the superior knowledge and intelligence obtained by the advance of science, can depose that now they could produce the same result by the process disclosed by the anterior patent as that designated by the subsequent one; and where in a patent of 1804 the effect of rolling two metals together of equal or unequal thickness, was to produce a metal of a particular character, and by a patent of 1848 the same result was indicated as being capable of being produced by the forced adhesion of the same two metals of prescribed thickness by rolling, the Court held that the former invention was not an anticipation of the subsequent patent, which was held to be a valid patent (2).

The invention protected by an anterior patent must have been capable of being used by the means designated by the specification—it is not sufficient to shew that scientific men of present day could produce same result by process disclosed in anterior patent as that designated in subsequent one.

4. The invention or discovery of a means of producing in abundance, suitable for economical and commercial purposes, an article previously known and obtainable in minute quantities only is a good subject of a patent. The principle laid down in *Brooke v. Aston* (3), that the mere application of a known process to a new article, the mode of application not being new, is not a good subject of a patent, does not apply where the process is chemical; and in this case, where Y. took out a patent for obtaining paraffine oil and paraffine from cannel coal by distilling it at a temperature gradually raised to low red heat, but never exceeding that point; and paraffine had been previously obtained from coal, but in very

The invention of a means of producing in abundance an article before known and obtainable in minute quantities, is a good subject of a patent.

The mere application of a known process to a new article (the mode of application not

(1) *Curtis v. Platt*, 35 L. J. (Ch.) 445; *v. Betts v. Menzie*, 3 Jur. (N.S.) 852; L. R. 1 H. L. 337; 10 Jur. 357, pl. 28, *post*.
823.

(3) 4 Jur. (N. S.) 279; 5 Jur. (N.S.)

(2) *Betts v. De Vitre*, 11 L. T. (N. S.) 1025.

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being new), is not good subject of a patent; but this principle does not apply where process chemical.

If patented invention partly original and partly communicated from abroad, *semble*, part communicated should be defined in patent and specification; if not done, Court will refuse interlocutory injunction.

It is part of condition of patent that the specification should particularly describe and ascertain the invention.

The ordinary rule of the Court is, not to grant injunction unless validity of patent established, or patent undisputed many years—but circumstances may induce Court to depart from that rule.

small quantities, and the process of dry distillation by gradually raising the temperature was well known, but by applying that process to cannel coal Y. had produced paraffine oil and paraffine in large quantities; Vice-Chancellor Sir J. Stuart, upon a bill praying an injunction and account of profits, held, that there was sufficient novelty to support the patent (1).

5. Where a patented invention is partly original and partly communicated from a foreign country; *semble*, that the part communicated from the foreign country should be defined in the patent, and in the specification, which should particularize what is new in the invention and what is old; and when this is not done, the Court, upon an interlocutory application, will refuse an injunction to restrain its alleged infringement. And this rule will apply, not merely to this, but to other matters, when the letters patent and specification fail in explicitness; and the age or date of the patent is, under such circumstances, a material element in the consideration (2).

6. It is part of the condition of a patent that the specification shall particularly describe and ascertain the invention, therefore in a patent for an improved arrangement, or a new combination of machinery, the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the entire machine, and the patent was held to be void in this case, the specification being held insufficient, and the bill for an injunction dismissed (3).

7. Although it is the ordinary rule of the Court not to grant a perpetual injunction to restrain the infringement of a patent, unless either the legal validity of a patent has been conclusively established or the patent has been undisputed for many years, yet the circumstances of the case may be such as to induce the Court to depart from that rule (4).

8. In a suit to restrain the further infringement of a patent right, and for the consequent account where the account is a simple one, such as where licenses or royalties have been granted; the

(1) *Young v. Fernie*, 10 Jur. (N. S.) 926; 12 W. R. 901.

(2) *Renard v. Levinstein*, 10 L. T. (N. S.) 177.

(3) *Foxwell v. Bostock*, 12 W. R. 723.

(4) *Renard v. Levinstein*, 10 L. T. (N. S.) 94, 177; *Hills v. Evans*, 31 L. J. (Ch.) 457.

Court will assess the amount of consequent damages; and in the case of a complex account the Court has jurisdiction to direct the necessary inquiries to be made in Chambers to ascertain the amount of such an account; but in the latter case a trial at Law by a jury is the more fitting tribunal by which the amount of such an account can be ascertained; therefore, when a patentee has obtained his injunction to restrain the further infringement of his patent right, and waives the usual account of profits, such an action will be directed, in addition to the injunction, the defendant giving all necessary facilities for the ascertainment of the profits in the meantime (1).

9. A licensee is, during the continuance of the license, estopped from disputing the validity of the licensor's patent; and the only way in which the licensee can do so is by putting an end to the agreement to take a license, and this he must do at his peril; so held in a case where C. was owner of patents for carpet manufactures, and agreed with D. to supply D. with machines embodying all the latest improvements, in consideration of D. paying the price, and a royalty for the use of the machines, and D. bought the machines and had paid the royalty for several years; but latterly D. bought elsewhere other machines which were identical in construction and principle with C.'s machines, and used the same, and thus was using both sets of machines, and D. thereupon disputed the validity of C.'s patent (2). And though, in *Dangerfield v. Jones* (3), upon a bill to restrain the infringement of a patent, where the defendants had taken out a license from the plaintiff to use the machines which had afterwards and prior to the hearing of the cause been revoked, Vice-Chancellor Sir W. P. Wood said he did not mean to say that the taking the license bound the defendants in any way, or that it operated by way of estoppel; yet this observation, taken with the decision above-mentioned in the case of *Crossley v. Dixon* (4), and the other cases in note (3), must

Licensee is, during continuance of license, estopped disputing validity of licensor's patent.

(1) *Betts v. De Vitre*, 11 L. T. (N. S.) 533.

(2) *Crossley v. Dixon*, 10 H. L. 293; 9 Jur. (N. S.) 607; 32 L. J. (Ch.) 617; 11 W. R. 716; 8 L. T. (N. S.) 260.

(3) 13 L. T. (N. S.) 142; *et v. Bowman v. Taylor*, 2 A. & E. 278; *Baird v.*

Neilson, 8 Cl. & F. 726; *Lawes v. Purcer*, 6 E. & B. 930; *Hall v. Conder*, 2 C. B. (N. S.) 22; *Nuton v. Brooks*, 7 H. & N. 499; *Grover and Baker Sewing Machine Company v. Millard*, 8 Jur. (N. S.) 713; pl. 17, *post*.

(4) *Supra*.

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Upon injunction to restrain infringement of patent for combination only of machinery. Court will not order machines to be broken up; but have them

If inventor writes and sends a description in a book of the discovery to a bookseller, and the book is exposed for sale; that is a publication, and it is also a publication if the first description is in a book published in France, and copies sent here to a bookseller and offered for sale.

If something remains to be ascertained necessary for useful application of the discovery, that is sufficient for another patent.

Prior knowledge, to avoid a patent, must be knowledge equal to that required to be given by a patent, i.e., such as will enable public to perceive the discovery and carry it into use.

The construction of a specification belongs to the Court.—The explanation of words therein,

merely imply that after the license is withdrawn there is then no longer an estoppel.

10. Where a patent for a combination only of machinery has been infringed, the Court will not, upon granting the injunction upon the motion for a decree, also order the defendant's machines to be broken up, but will order them to be marked, and direct an affidavit to be made of the number of machines; Vice-Chancellor Sir W. P. Wood said there appeared to be no precedent that the machines should be destroyed (1).
marked and an affidavit of the number.

11. A publication of a new discovery takes place when the inventor of it, either by himself or by his agent, having written a description of it in a book, and sent it to a bookseller, such book is offered or exposed for the purpose of sale; and the first description of an invention in a book published in France, and the sending of copies of the book to England to a bookseller, which are offered by him for sale, is a sufficient publication in this country of the invention, and no valid patent can afterwards be taken out in this country for the same invention (2).

in a book published in France, and copies sent here to a bookseller and offered for sale.

12. Where something remains to be ascertained which is necessary for the useful application of the discovery that affords sufficient room for another valid patent (3).

13. To support an allegation of want of novelty, whatever is essential to the practical working and real utility of the invention must be found substantially in the prior publication (4). Prior knowledge, to avoid a patent, must be knowledge equal to that required to be given by a patent; that is, such knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical use (5).

14. Although the construction of a specification belongs to the Court, the explanation of the words used therein, or of technical terms of art, is matter of fact upon which it is the province of

(1) *Needham v. Ozley*, 11 W. R. 852.

(2) *Laing v. Gisborne*, 31 Beav. 133; 8 Jur. (N. S.) 736.

(3) *Hills v. Evans*, 8 Jur. (N. S.) 525; 31 L. J. (Ch.) (N. S.) 457.

(4) *Ib.*

(5) *Ib.*

a jury to decide; and in the comparison of two specifications, each of which is filled with terms of art and with the description of technical processes, it is the duty of the Court to give the legal construction; but the work of comparing the two specifications is for the jury (1).

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or technical terms, is the province of a jury.

15. Where a patent had been granted for an invention for the purification of gas by means of precipitated or hydrated oxides of iron, and the specification stated the mode of obtaining such oxides, the use of a natural substance called bog ochre containing precipitated oxides of iron was held not to be an infringement of the patent; but the Court granted an injunction to restrain the use of this substance when revived in the manner described in the specification, being a process by which the old materials could again be applied as a purifying element (2).

Where specification stated mode of obtaining certain oxides for purifying gas, the use of a natural substance containing the oxides is not an infringement of patent, unless revived in manner described in the specification.

16. Where two parties have obtained patents for the same invention, the Court will not interfere by an interlocutory injunction, but leave them to try the legal right by *scire facias*, being disabled, by reason of sect. 1 of 25 & 26 Vict. c. 42, from directing a case for the opinion of a Court of Law (3); and the Vice-Chancellor, Sir R. T. Kindersley, said that he could not help feeling, also, that a question might be raised as to the validity of the plaintiff's patent, and under all the circumstances he thought the best course was to put the defendant upon an undertaking to keep an account of what cartridges (the subject of the patent) were sold by him, and to direct that the matter should stand over until the hearing.

Where two parties have obtained patents for same invention, Court will not interfere by interlocutory injunction, but leave them to try legal right by *scire facias*.

17. The fact of a patent having been found invalid at Law, upon proceedings between the patentee and third parties, is no answer to a suit, based upon the same patent, for an injunction and consequent relief against a licensee who has covenanted to pay royalties, and is selling the invention contrary to his covenant without payment of the royalties (4). And so, where N. obtained a patent for the application of the principle of smelting iron by the use of heated air applied to furnaces, and B. obtained a license from him

Though a patent be found invalid as between patentee and third parties, licensee and covenantor, cannot set up such fact to suit by his licensor.

(1) *Hills v. Evans*, 8 Jur. (N. S.) 525; 31 L. J. (Ch.) (N. S.) 457.

(3) *Copeland v. Webb*, 11 W. R. 134.

(2) *Hills v. Liverpool United Gas-light Company*, 9 Jur. (N. S.) 140; 32 L. J. (Ch.) 28.

(4) *Grover and Baker Sewing Machine Company v. Millard*, 8 Jur. (N. S.) 714.

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to use this process, on the payment of 1s. per ton on the iron thus smelted, and disputes and then litigation rose between them; and it was agreed by an instrument dated the 11th of November, 1833 (which recited the previous circumstances), that both parties should withdraw their law processes, and that "in consideration of the present payment of £400, to be accepted by N. in full of 1s. per ton on the whole iron smelted from the erection of B.'s works up to the 11th day of November current, and in consideration of the payment of 1s. per ton upon the whole iron which should be smelted from the 11th of November current till the expiry of the letters patent by the use of heated air in any of the modes theretofore applied, or in any other mode falling under the said patent," N. should grant to B. a license, which further on in the agreement was described to relate to "the application or use of heated air in any of the modes heretofore practised at B.'s works, or in any other mode falling under the description of the said patent, or in the specification thereof," and N. afterwards instituted a suit to compel B. to perform this agreement, and B. instituted a cross suit to suspend N.'s proceedings, on the ground that the process of smelting by heated air used at B.'s works did not fall within the patent, the House of Lords held, that after this agreement B. could not set up such a defence to the claim of N. (1).

When issue directed to try validity, not proper to direct inquiry as to novelty. Where *prima facie* infringement, length of enjoyment influences the Court.

18. When an issue is directed to try the validity of a patent, it is not the proper form to direct an inquiry as to the novelty of the invention or manufacture (2).

19. Where there is a *prima facie* case of an infringement of a patent, the length of time which the patent has been enjoyed by the patentee will influence the Court in granting an injunction against the parties who are alleged so to have infringed upon his rights; and where letters-patent were dated in November, 1851, which had been duly assigned to the plaintiff, and the defendant's letters-patent were dated in January, 1859, after the Patent Law Act, 1852, Vice-Chancellor Sir W. P. Wood held, that the first patentees without registration were to be considered as sole owners (3).

(1) *Baird v. Neilson*, 8 Cl. & F. 726. (2) *Spencer v. Jack*, 8 Jur. (N. S.) 1165.
v. pl. 9, *ante*.

(3) *Davenport v. Richard*, 3 L. T. (N. S.) 503.

20. Where a defendant to a bill filed to restrain an infringement of a patent by his answer denies the novelty of the invention, the plaintiff, in support of a motion for an injunction, must make a clear affidavit of his belief in the novelty of the invention (1). In an injunction suit to restrain an infringement of a patent, a plaintiff moving, in 1860, for leave to proceed at Law, no motion for an injunction having been made, was bound to file an affidavit of his belief in his title and in the alleged infringement; and the Court, upon such an affidavit, made an order, notwithstanding an application by the defendant that the motion might stand over for the cross-examination of the plaintiff (2).

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If novelty is denied, plaintiff to obtain an injunction must make an affidavit of his belief in novelty.

21. Where the plaintiffs were owners of a type-founding patent, and the defendant was a printer, who used types alleged to be colourable imitations of the type patented by the plaintiff, on a bill for an injunction Vice-Chancellor Sir W. P. Wood held that the Court had jurisdiction to order the defendant to deliver a sample of type to the plaintiffs for analysis; and that laches, sufficient to defeat the plaintiff's right to an interlocutory injunction, was no bar to an order on the same motion for inspection and delivery of samples (3).

The Court has jurisdiction to order delivery of sample of type for analysis.

Laches disentitling to interlocutory injunction, no bar to an order for inspection and delivery of samples.

22. Upon the construction of the 15 & 16 Vict. c. 5, s. 2, which makes void letters-patent at the expiration of three years from the date thereof, unless certain stamp duties are paid before the expiration of the three years, the Master of the Rolls, Sir J. Romilly, held, that the day of the date of the letters-patent is excluded, and that the three years do not expire until 12 at night of the anniversary of the day on which the letters-patent are granted (4).

23. The specification of an invention, which consists in the use of known materials in new proportions, is not necessarily bad for uncertainty, though the patentee does not limit himself to the proportions recommended; and where a specification stated in substance that the usual practice in the manufacture of type was to employ

The specification of an invention, consisting in the use of known materials in new proportions, is not

(1) *Whitton v. Jennings*, 1 Dr. & Sm. 110.

(2) *Mayer v. Spence*, 1 J. & H. 87; but see now the Chancery Regulation Act, 25 & 26 Vict. c. 42, empowering the Court of Chancery to decide all questions of law and fact on the deter-

mination of which the title to relief or remedy in Equity depends.

(3) *Patent Type Founding Company v. Walter*, Joh. 727.

(4) *Williams v. Nash*, 28 L. J. (Ch.) 886; 5 Jur. (N. S.) 966.

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necessarily
bad for uncer-
tainty, though
patentee does
not limit him-
self to the
proportions
recommended.

lead and antimony, and in some cases to add a small percentage of tin; that the object of the invention was to obtain tougher metal, by employing tin in large proportions with antimony, greatly reducing or wholly omitting, the use of lead; and that the best proportions were seventy-five of tin and twenty-five of antimony, but that this might be to some extent varied, and that if lead were used it must not exceed fifty per cent. of the whole, one part of antimony to three of tin, or tin and lead, being the best; Vice-Chancellor Sir W. P. Wood held, on a demurrer to a bill by the assignees of the patent to restrain an infringement that the specification was not bad on the face of it for uncertainty, and that the evidence of persons acquainted with the usual modes of manufacture was necessary to determine whether the invention was stated with sufficient precision (1).

The right to
an account of
profits made
by infringe-
ment of
patent, is inci-
dent to the
right to re-
strain future
infringements.

24. The right to a decree in Equity for an account of the profits made by the manufacture and use of articles, in the infringement of a patent, is incident to the right to an injunction to restrain future infringements, and where no case is made for the injunction the account will not be decreed (2); and this rule in patent cases, that a Court of Equity cannot decree an account unless it can grant an injunction, applies, notwithstanding it may appear at the hearing that since an interim injunction was moved for the defendant had sold articles which, had the facts and law been on the application for the interim injunction sufficiently ascertained, the Court would have restrained him from selling (3).

25. Where the owners of a patent for a peculiar mode of manufacturing iron wheels for railway-carriages, having discovered that several railway companies were violating their patent, had brought an action for damages against one of such companies only, but had not in any way given notice to the other companies to discontinue their infringements of the plaintiffs' right; and in the action the validity of the patent was disputed, and it was not decided until three years after the patent had expired, when a verdict was given for the plaintiffs with large damages, and thereupon the plaintiffs

(1) *Patent Type Founding Company v. Richard*, Joh. 381. 408; 23 L. J. (Ch.) 562.

(2) *Smith v. London and South Western Railway Company*, 1 Kay, 4 K. & J. 727.

(3) *Price's Patent Candle Company v. Banwen's Patent Candle Company*,

filed a bill for an account of profits and an injunction against another of the companies who had infringed their patent, complaining of acts done nine years before; the Court held, that the delay was not excused by the pendency of the action, but was fatal to the plaintiffs' case (1).

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Delay of nine
years disen-
titled (here)
to account and
injunction.

26. In an infringement of a recent patent it is not a matter of course to require the plaintiff to establish his right at Law, but the Court will have regard to the whole case made on the pleadings and by the evidence (2).

27. Where a bill had been filed to restrain the infringement of a patent, and the plaintiff, by leave of the Court, had brought an action, and failed on the ground of part of the apparatus not being new, and the plaintiff then amended the specification of the patent by disclaiming that part, and in this state of things the cause came on for hearing, but the objection was taken that under the 5 & 6 Will. 4, c. 83, s. 1 (3), the plaintiff could not maintain his case by referring to the specification as it then stood, but that it must be taken still to be as it was when the bill was filed, and the objection being fatal, Vice-Chancellor Sir W. P. Wood suggested that to save the expense of a new suit the plaintiff should pay the defendant's costs of suit up to that time, and be allowed to amend the bill, instead of having it dismissed with costs, with liberty to file a new bill; and an order to the above effect had been made without the Vice-Chancellor's attention being called to the enactment in the first section prohibiting the receiving in evidence a disclaimer in any suit pending when it was filed, and the costs had been paid, and the bill amended by varying the statement of the specification, but the defendant, by answer to the amended bill, insisted on this statutory objection, which the Vice-Chancellor on a motion for an injunction being made held fatal to the suit; the Court of Appeal, affirming the decision of Vice-Chancellor Sir W. P. Wood, held that the plaintiff was entitled, on motion, to have his bill dismissed without costs, and without prejudice to a new bill, as he had been misled by the act of the Court (4).

(1) *Smith v. London and South Western Railway Company*, 1 Kay, Amendment Act, 1852 (15 & 16 Vict. c. 83).

408; 23 L. J. (Ch.) 562.

(2) *Clark v. Fergusson*, 1 Giff. 184.

(3) Incorporated into the Patent Law

(4) *Lister v. Leather*, 1 De G. & J. 361; 3 Jur. (N. S.) 433; 26 L. J. (Ch.)

557.

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A patent for a conjectured new method of effecting an object never put into practical operation, does not invalidate a patent for the same process granted to a subsequent inventor.

28. Where a man having conjectured a new method of effecting a desired object, takes out a patent for it, but never puts it in practical operation, that will not invalidate letters patent taken out for the same process by a subsequent inventor, who shall of himself discover the same method (1); and where the plaintiff had obtained, in 1849, letters patent for a mode of combining lead and tin for making capsule plates, by placing plates of each, of unequal thickness, in contact, and subjecting them to great pressure, by repeated rolling or otherwise, so as to effect great cohesion and tenuity; and in 1856 W., having two processes by which he made capsules abroad, the first being the same as the plaintiff's, and the second being commenced by dipping heated lead into melted tin, and then rolling out the plated block, which last W. affirmed to be the cheapest way, introduced some of such capsules into England with a view to effect sales thereof; and the plaintiff immediately commenced proceedings in Chancery against the agent in England of W., and W. not assisting in the defence, a decree and injunction were taken by consent against the agent, who submitted when he found the defence thrown on him; but in 1857 the plaintiff discovered that W. was again transmitting to this country capsules for sale, and W. swore that they were all made according to his dipping process, but he did not state how he had made sure of that fact, although it was sworn on the other side that no man could distinguish between the capsules made by the two processes; and W. also alleged that he had, since October, 1856, discovered that in 1804 a patent had been taken out for effecting cohesion by pressure, but it did not appear that that patent had ever been worked, or was capable of being worked, for it directed equal thicknesses of lead and tin to be rolled together, which the plaintiff alleged would not do, but that they must be unequal; Vice-Chancellor Sir W. P. Wood held, that the previous publication in 1804, as it did not appear to have been ever worked, and did not appear to be proper for working, did not invalidate the plaintiff's patent, although it pointed out the mode of effecting cohesion by pressure; and even if there were great doubt as to the validity of the plaintiff's patent, yet the long undisturbed enjoyment for eight

(1) *Betts v. Menzies*, 3 Jur. (N. S.) 29; *v. Betts v. De Vitre*, 11 L. T. (N. S.) 357; 10 H. L. C. 117; 9 Jur. (N. S.) 445; pl. 3, *ante*.

years, and the conduct of W. in not trying the question when the plaintiff raised it in 1856, entitled him to an injunction until the validity of the patent could be tried at Law; and *semble*, that W.'s second process was an infringement of B.'s patent; and that under the circumstances the injunction would be granted, although the question of the infringement required also to be sent to a jury (1).

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29. On an application for an injunction to restrain the infringement of a patent the party must swear that at the time of making the application he believes that at the date of the patent the invention was new, or had not been previously known or used in this kingdom (2). The fact that a patent is a recent one is no ground for refusing an injunction *ex parte* to restrain its infringement, but the party seeking such injunction is bound to support his application by a clear and distinct statement, upon affidavit, that he believes the patentee is the original inventor, and that the invention had not been practised at the time when the patent was granted; and where A., in May, 1856, had become purchaser of a patent, which was obtained in May, 1855, and which the defendant, as alleged, subsequent to the date of the purchase, infringed, and A. had obtained an injunction *ex parte* to restrain the defendant, on an affidavit in support, which stated that the patent had been recorded, and that it became and was good and valid, the injunction was dissolved on the ground that it had been obtained *ex parte* upon an affidavit insufficient in this respect, and with costs (3).

Nature of affidavit required on motion to restrain infringement of patent.

The grant being recent, no ground for refusing *ex parte* injunction.

30. Where a patent is taken out as for an original invention, the subject of the patent being in fact a communication from a British subject resident abroad, the patent is void (4); but, *semble*, an agent in this country of an inventor abroad, receiving a confidential communication of an invention not in a practically useful state, may take out a patent for his own benefit, if he, pursuing the idea thus thrown out, discovers a practical way of carrying it into effect (5). And where T., the plaintiff, a British subject, resident abroad, having conceived an improvement in making pianos, had given to the son of his London agent, who happened

A patent, the subject of which is in fact a communication from a British subject resident abroad, is void.

(1) *Betts v. Menzies*, 3 Jur. (N. S.) 357; 10 H. L. C. 117; 9 Jur. (N. S.) 29; *v. Betts v. De Vêtre*, 11 L. T. (N. S.) 445, pl. 3, *ante*.

(3) *Gardner v. Broadbent*, 2 Jur. (N. S.) 1041.

(4) *Milligan v. Marsh*, 2 Jur. (N. S.) 1083.

(2) *Sturz v. De la Rue*, 5 Russ. 322.

(5) *Ib.*

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to be on a visit at T.'s house, a full description and drawings of the invention, marked "private," and requested the son, on his return to London, to take out letters patent or to register the invention for him, T., the son returned to London and delivered the drawings to his father, the defendant M. being T.'s London agent, and T. about the same time wrote a letter to M., not marked private, and not desiring him to take out a patent on behalf of the writer, but inquiring generally as to the invention, and whether a patent for it was being taken out; and shortly afterwards M. took out a patent for the improvement in question in his own name, and as for an invention of his son; and then T. having employed S. to make such pianos on his own account, M. had brought an action for the infringement of his patent against S., and thereupon T. filed a bill to restrain the action and the use of the patent by M., and the defendant M. insisted that the invention, as described in T.'s communication, would not work; the Court held, on motion for an injunction, that the whole question must stand over to await the result of the action (1).

31. Where an agreement had been entered into between four persons who were interested in certain patents and inventions relating to gutta percha, that all patents taken out, or in the course of being taken or intended to be taken out, or that might at any time thereafter be taken out by any or either of them, or on account of and for the benefit of any or either of them, in relation to the preparation and application of gutta percha, or the manufacture of any article therefrom, should be assigned to trustees, and held for their common benefit; and subsequently one of the parties took out a patent for "improvements in apparatus and machinery for giving shape and configuration to plastic substances," and refused to assign the patent to the trustees, alleging that it was not comprised in the agreement; the Court held, that the patent, so far as it related to gutta percha, was subject to the trusts of the agreement, and that it could not be treated as not being so because it was for machinery which might be applied to the manufacture of articles of gutta percha, and was not for the manufacture of any such articles (2).

(1) *Milligan v. Marsh*, 2 Jur. (N. S.) 1083.

(2) *Bewley v. Hancock*, 6 De G. M. & G. 391.

32. Where a patent had been in force for twelve years, and had been the subject of four suits against different persons, all of which terminated favourably to the patentee, and in two of which verdicts had been given in favour of the validity of the patent; the Court held, that in a fifth case the patentee was entitled to an injunction pending the trial of the legal right, although a fresh fact was brought forward tending to impeach the novelty of the invention (1).

33. A patentee does not acquiesce in the infringement of his patent by omitting to proceed by *scire facias* to set aside a subsequent patent extending to part of his invention, unless such subsequent patent is put in practice (2).

The omitting to proceed by *scire facias* to set aside a subsequent patent; is not acquiescence, unless subsequent patent is put in practice.

34. Long and exclusive enjoyment under letters patent entitled a party to an injunction until an action could be tried at Law (3). And where there had been such length of exclusive enjoyment under a patent, the Court granted an injunction in the first instance without previously putting the party to establish this right by an action at law; but otherwise where the patent was recent (4). And where an injunction had been granted against the infringement of a patent, that the validity of the patent might be tried at Law, and there was a verdict for the patentee, subject to the opinion of the Court, and upon a case the Court were equally divided, the Court said the patentee must bring another action if nothing could be done on this one; but the Court said it would not disturb the plaintiffs' possession of their specific right, and would not impose any terms upon them, nor dissolve the injunction in the meantime (5). And though the Court would not generally, in doubtful cases, restrain by injunction the infringement of an asserted legal right until its validity had been established by an action at Law; yet, *secus*, where there had been long uninterrupted enjoyment under a patent, that being regarded as *primâ facie* evidence of title (6). But though the Court would not, in the first instance, interfere by injunction to restrain the infringement of a patent unless there had been long and uninterrupted

Long and exclusive enjoyment of patent entitles to injunction until the right is tried.

If patent recent no injunction in the first instance without previous trial of right.

But though Court does not in first instance interfere unless

(1) *Newall v. Wilson*, 2 De G. M. & (Ch.) 184; 3 Jur. 34.

G. 282.

(4) *Hill v. Thompson*, 3 Mer. 622.

(2) *Ib.*

(5) *Bolton v. Bull*, 3 Ves. 140.

(3) *Curtis v. Cutts*, 8 L. J. (N. S.)

(6) *Stevens v. Keating*, 2 Ph. 133.

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where long uninterrupted enjoyment—yet if laches in the application, it will not in first instance interfere—even if long enjoyment.

Validity of patent may be disputed by defendant, though established in action against another person.

But defendant (here) will be restrained infringing.

enjoyment under it, but directed an action to be brought to try the legal right; yet delay in filing the bill was a ground for refusing the injunction; and where the patent had been obtained in 1846, and the alleged infringement of it took place in 1847, and the bill was not filed for more than two years afterwards, the Court refused an injunction (1). But a defendant in a suit to restrain an infringement of a patent is entitled to dispute the validity of the patent, although the patentee has obtained a judgment at Law against another person establishing its validity; but until he has proved its invalidity he will be restrained from infringing on it (2). And in a suit to restrain an infringement of a patent, the validity of which had been established at Law against another defendant, the Court at the hearing being satisfied of the sufficiency of the specification, the utility of the invention, and the fact of the infringement, granted an injunction to restrain him from infringing the patent, and directed an issue to be tried at Law as to the novelty of the invention (3).

35. Where the plaintiff, through several mesne assignments, being in possession of a right, originally in the City of London, of supplying Southwark with water, prayed an injunction to restrain the defendant from encroaching on his right by raising engines, laying pipes, &c., the Court allowed a demurrer by the defendant, both as it was a case of great consequence to the public, and also because the plaintiff ought first to have established his right at Law, as the chance there was of the plaintiff's right falling to the ground at Law was a strong reason for the demurrer (4); and in *East India Company v. Sandys* (5) the Court refused an injunction to stay an interloper's trading to the East Indies till the value of the East India Company's patent had been tried.

36. In *Greerson v. Jackson* (6) it was held that a patentee claiming an exclusive right of printing bibles was bound to establish his right at Law before he could have an injunction in Equity. And in an *Anonymous Case* in Vernon (7) the Court refused a motion

(1) *Baxter v. Combe*, 1 Ir. Ch. Rep. 284.

(2) *Bovill v. Goodier*, L. R. 2 Eq. 195.

(3) *Ib.*

(4) *Whitchurch v. Hide*, 2 Atk. 391.

(5) 1 Vern. 127.

(6) 1 Ridgw. L. & S. 304.

(7) 1 Vern. 120.

by the King's patentees for an injunction to stop the sale of English bibles printed beyond the sea till the validity of the patent had been tried at Law.

37. Upon a bill brought by the King's printers to restrain the defendant from the publication of certain Acts of Parliament, &c., to which the patentees for printing law books were also defendants, the Court refused to interfere between the contending parties by the summary method of injunction, both claiming under patents, but left them to adjust their rights in a due course of law, but restrained the defendant from printing at any other than a patent press (1).

38. In *Caldwell v. Vanolissengen* (2), Vice-Chancellor Sir G. J. Turner said, that the question whether the Court will interfere to protect a patentee before he has established his right at Law, or will suspend its interference until the right at Law has been established, appeared to him to depend upon very simple principles. He said that it is part of the duty of this Court to protect property pending litigation; but when it is called upon to exercise that duty the Court requires some proof of title in the party who calls for its interference. In the case of a new patent this proof is wanting; the public, whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and the Court therefore refuses to interfere until his right has been established at Law. But in a case where there has been long enjoyment under the patent (the enjoyment, of course, including use), the public have had the opportunity of contesting the patent; and the fact of their not having done so successfully affords at least *prima facie* evidence that the title of the patentee is good, and the Court therefore interferes before the right is established at Law; and that in the present case he thought that the plaintiffs had proved such a case of enjoyment under the patent, and of their title having been maintained at Law against the several attempts which had been made to impeach it; that the Court was bound at once to interfere for their protection, unless there were other sufficient grounds for withholding its interference.

39. What previous user will invalidate, and what user, if any,

(1) *Baskett v. Cunningham*, 2 Eden, 137; 1 W. Bl. 370.

(2) 9 Hare, 424.

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can be admitted in contravention of the patent right, are different questions, depending, one upon the extent of previous knowledge, the other upon the effect of the grant (1); and there may be a case of necessity in which there might be an innocent use of a patent (2).

40. Upon a motion for an injunction against the infringement of a patent, an allegation as to the defendant's inability to be answerable in damages is not irrelevant (3).

Injunction to restrain infringement granted against aliens (except as to ships, *vide infra*).

41. In *Caldwell v. Vanvlissengen* (4) the Court granted an injunction against subjects of the kingdom of Holland to restrain them from using on board their ships within the dominions of England, without the license of the plaintiffs, an invention to the benefit of which the plaintiffs were exclusively entitled under the Queen's patent (5). But the user on board an English vessel in an English colony of an article the subject of patent for the United Kingdom is not an infringement (6).

Injunction at hearing not refused because not applied for on an interlocutory motion. But in such a case clear title must be made out at hearing;

42. Where a bill is filed by a patentee for an injunction to restrain an alleged infringement of his patent, the plaintiff is not precluded from asking for an injunction at the hearing by the fact of his not having applied for it on an interlocutory motion; but the not moving for an injunction imposes on the plaintiff in such a case the obligation of making out a clear and unexceptionable title at the hearing; and if he fails in that, and has not previously obtained an injunction, he will not be allowed to use the facts proved in the cause as evidence of a *primâ facie* case, giving him a right to further time for the purpose of enabling him to establish

and a *primâ facie* title not sufficient.

(1) *Caldwell v. Vanvlissengen*, 9 Hare, 428-429.

(2) *Caldwell v. Vanvlissengen*, *supra*; *et v. Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689; *Minter v. Williams*, 4 Ad. & E. 251.

(3) *Newall v. Wilson*, 2 De G. M. & G. 282.

(4) 9 Hare, 415.

(5) But by the 15 & 16 Vict. c. 83, s. 26, it is enacted that "No letters patent for any invention (granted after the passing of the Act) shall extend to prevent the use of such invention in any foreign ship or vessel, or for the

navigation of any foreign ship or vessel, which may be in any port of her Majesty's dominions, or in any of the waters within the jurisdiction of any of her Majesty's Courts, where such invention is not so used for the manufacture of any goods or commodities to be vended within or exported from her Majesty's dominions," with a proviso excepting ships of foreign states in whose ports British ships are prevented from using foreign inventions.

(6) *Newall v. Elliott*, 10 Jur. (N.S.) 954.

more satisfactorily his legal title (1); and where, in August, 1835, a patentee filed a bill to restrain an alleged infringement of his patent, and the defendant having by his answer denied the validity of the patent, and also the fact of the alleged infringement, the plaintiff made no interlocutory application for an injunction, but went into evidence in support of his case, and in May, 1839, brought the cause to a hearing; the Master of the Rolls, Lord Langdale, being of opinion that the plaintiff, upon the evidence, had not made out a case which would have supported an injunction if applied for in the interlocutory stage, refused to give him an opportunity of establishing his title at Law by restraining the bill, with liberty to bring an action, and dismissed the bill with costs; and the Lord Chancellor, Lord Cottenham, on appeal, affirmed the decision (2). The Lord Chancellor said that the jurisdiction of this Court is founded upon legal rights, the plaintiff coming into this Court on the assumption that he has the legal right, and the Court granting its assistance upon that ground; and that when a party applies for the aid of the Court, the application for an injunction is made either during the progress of the suit or at the hearing, and in both cases he apprehended great latitude and discretion were allowed to the Court in dealing with the applications; and that when the application is for an interlocutory injunction several courses are open: the Court may at once grant the injunction *simpliciter*, without more—a course which, though perfectly competent to the Court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title—or it may follow the more usual, and, as he apprehended, more wholesome practice in such a case, of either granting an injunction and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at Law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the meantime keeping an account, and that which of these several courses ought to be taken must depend entirely upon the discretion of the Court, according to the case made, and that when the cause comes to a hearing the Court has also a large latitude left to it; and that

The jurisdiction in this Court is founded on legal rights and the assumption that the plaintiff has the legal right.

Courses open to the Court on interlocutory application.

(1) *Bacon v. Jones*, 4 My. & Cr. 433; *tiswoode*, 1 Beav. 382; 3 Jur. 476, 994.
affirming S. C. *sub nom. Bacon v. Spot-* (2) 1b.

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The course
of the Court at
the hearing.

If defendant
denies novelty
and enjoy-
ment, and the
specification
is imperfectly
set forth in
bill, Court
will dissolve
an injunction
granted on
affidavit,
giving plain-
tiff liberty to
bring an
action.

he was far from saying that a case might not arise in which, even at that stage, the Court would be of opinion that the injunction might properly be granted without having recourse to a trial at Law; and that the conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right and of the evidence by which it is established, these and other circumstances might combine to produce such a result, although this was certainly not very likely to happen, and that he was not aware of any case in which it had happened. Nevertheless, it was a course unquestionably competent to the Court, provided a case were presented which satisfied the mind of the judge that such a course, if adopted, would do justice between the parties; and again, that the Court may, at the hearing, do that which is the more ordinary course, it may retain the bill, giving the plaintiff the opportunity of first establishing his right at Law; and that there still remained a third course, the propriety of which must also depend upon the circumstances of the case, that of at once dismissing the bill. In *Collard v. Allison* (1), where the validity of the patent was not clear, nor the evidence of exclusive possession satisfactory, the Court refused an injunction until the validity had been tried in an action at law. So, where, after a verdict, and pending a rule *nisi* for a new trial, the right at Law was still undecided, although a patent may be long standing, yet, if from the nature of the alleged invention, or the conflicting evidence of its novelty, its validity appears to be doubtful, the Court will not grant an injunction until the title has been established at Law (2). And if the answer to a bill to prevent the infringement of a patent deny the invention to be new, and also the enjoyment under the letters patent, and state (as is the fact) that the specification is imperfectly set forth in the bill, the Court will dissolve an injunction previously obtained, on affidavit, giving the plaintiff liberty to bring an action, although the defendant admits by his answer that he has made machines upon the principle comprised in the letters patent (3).

43. In *Bridson v. Benecke* (4), where a special injunction on notice to prevent the infringement of a patent had been refused

(1) 4 My. & Cr. 487.

(2) *Ib.*

(3) *Curtis v. Cutts*, 8 L. J. (N. S.)

(Ch.) 184; 3 Jur. 34.

(4) 12 Beav. 1.

on the ground of delay, notwithstanding the Court had a strong impression in favour of the plaintiff's right, and at the hearing an injunction was also refused, and the plaintiff put to establish his legal rights, and the plaintiff was successful on the trial, but the defendants tendered a bill of exceptions, the Court granted an injunction, under the circumstances, before the bill of exceptions had been disposed of. But in *Bridson v. McAlpine* (1), in a patent case, a motion for an injunction was ordered to stand over for the plaintiff to bring an action to establish his right. The plaintiff obtained a verdict, but the defendant tendered a bill of exceptions, which could not be determined without some considerable delay; and upon the motion being renewed, the Court, under the circumstances, ordered it to stand over till the bill of exceptions had been disposed of. The Master of the Rolls, Lord Langdale, in this case said, that in every case of this kind it is important to consider what it is that the Court can most satisfactorily do provisionally; that where an injunction is asked to restrain the infringement of a patent, the Court has occasion to consider, first, the validity of the patent, and, secondly, the fact of the infringement, and that where those two facts are established it is within the power, as it is the duty, of the Court to grant the injunction; that there are many cases in which it is not clear either that the patent is legally valid, or that it has been infringed, and that it depends on the degree of doubt which exists on these questions whether the Court will grant the interim injunction. In such cases it will cautiously consider the degree of convenience and inconvenience to the parties by granting or not granting the injunction; and the Master of the Rolls said that these things are to be carefully considered; that the right between the parties is a legal right, and being a legal right, this Court, in cases where the matter is doubtful, is naturally anxious to obtain the decision of a Court of Law, where the matter is properly cognisable (but now the Court of Chancery has jurisdiction), before it interferes to prevent a party exercising his *primâ facie* rights. That according to the doubt which may exist in the mind of the Court upon the facts, and according to the degree of inconvenience to the parties, the Court, not thinking fit to grant the injunction at the time, may take one of several courses :

Where validity and infringement are established, Court grants the injunction.

Where validity or infringement in doubt, the Court considers the degree of convenience and inconvenience to the parties by granting injunction.

(1) 8 Beav. 229.

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The right to an injunction subsists though there be a promise to commit no further infringement—and after injunction obtained, plaintiff may bring cause to hearing unless defendant offers to pay costs of suit.

Injunction only obtainable on ground of interest in plaintiff, and where plaintiff can maintain an action on the case.

it may either refuse to grant the injunction simply, or it may refuse it on the terms of the party undertaking to keep an account, or it may direct the motion to stand over on the terms of the plaintiff proceeding to a trial at Law (and now to a trial before itself).

44. Upon the invasion of a patent right the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement and may offer to pay the costs of preparing the bill; and if the defendant does not, after injunction obtained, offer to pay the costs of it, the plaintiff may bring the suit to a hearing, and will be entitled to the costs of the suit; *sed quære*, whether in such a case the Court will give an account of damages (1).

45. Where, by the 26 Geo. 3, c. 57, s. 1, the Crown was authorized to grant letters patent for establishing and keeping a theatre in Dublin; and by sect. 2 it was enacted that no person should, for hire, act any play in any theatre in Dublin except in such theatre as should be so established by letters patent, under the penalty of forfeiting £300 for every such offence, to be sued for by the common informer; and under this statute the Crown granted letters patent to H., authorizing him, during a certain time, to keep a theatre in Dublin, and His Majesty prohibited and forbid all persons whatever during the term to keep open, in any manner, any theatre in Dublin, and therein to act any play, unless they should be authorized by His Majesty; the Court held, that the patentee could not maintain a bill for an injunction to restrain unauthorized persons acting plays in a theatre in Dublin, for the keeping of which no patent had been granted, and that such a bill could only be maintained upon the ground of interest in the plaintiff; and unless he could sustain an action on the case the injunction could not be supported (2).

46. A new adaptation of old materials is sufficient to ground an injunction against the infraction of a patent (3).

47. In *Crossley v. Derby Gaslight Company* (4) the Court, upon

(1) *Geary v. Norton*, 1 De G. & Sm. 9. 675, 901; *Hill v. Tupper*, 2 H. & C. 121.

(2) *Calcraft v. West*, 2 J. & Lat. 123; (3) *Luckie v. Robson*, 2 Jur. 201.

8 Ir. Eq. Rep. 74; *et v. Ackroyd v. Smith*, (4) 1 Russ. & My. 166; 4 L. J. (N.S.)
10 C. B. 164; *Whaley v. Laing*, 3 H. & N. Ch. 25.

the suggestion that the defendant had a large stock of the pirated articles on hand ready to be thrown into the market as soon as the monopoly was at an end, which they had no right to do, to the prejudice of the plaintiff, who had the exclusive privilege of manufacturing during the fourteen years, granted, on an *ex parte* motion on the bill and affidavits proving the infringement, an injunction generally to restrain the sale, both before and after the term limited by the patent, of machines piratically manufactured while the patent was in force.

48. In *Harmer v. Plane* (1) the Court granted an injunction upon the ground of possession by the patentee, that is to say, a reasonably long and undisputed possession under a patent, until the right could be tried, though subject to considerable doubt, the patent being for improvement upon a machine the subject of a former patent expired, and the specification described the original machine with the improvement as one entire machine, the subject of the latter patent not distinguishing the improvement. The Lord Chancellor (Lord Eldon) observing, that where the Crown on behalf of the public grants letters patent, the grantee entering into a contract with the Crown, the benefit of which contract the public are to have, and the public have permitted a reasonably long and undisputed possession under colour of the patent, the Court has thought, upon the fact of that possession proved against the public, that there is less inconvenience in granting the injunction until the legal question can be tried than in dissolving it at the hazard that the grant of the Crown may, in the result, prove to have been

Injunction is granted upon a reasonably long and undisputed possession.

The public permitting reasonably long and undisputed possession therein, less inconvenience in granting injunction until trial of right, than in dissolving it.

49. Where a patentee applied to the Court of Chancery to stay all proceedings on a *scire facias* to repeal the patent, or that a *nolle prosequi* might be entered on the ground that the prosecutor was an alien, the Court held, that it had no authority to interfere in the matter (2). An illegal monopoly is a public nuisance, and the Crown, having been informed of such grievance, and having the power and duty to remove it, if it be such, ought not to be disabled from directing the necessary proceedings to ascertain the truth because the information was given by an alien (3).

The Court has no authority to stay proceedings by an alien on a *scire facias* to repeal a patent.

50. An invention for giving paper, by the application of a cer-

(1) 14 Ves. 130.

(2) *The Queen v. Prosser*, 11 Beav. 306.

(3) *Ib.*

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There must be
the utmost
good faith in
the specifica-
tion.

tain composition, such a surface as renders the lines of copper and other plate printing clearer and more distinct, may properly be described in a patent as an improvement in copper and other plate printing; and where one of the ingredients in the composition was a white substance, imported from Germany, which could be purchased from one or two colour shops in London, and the only description or denomination given to it in the specification, was "the purest and finest chemical white lead," but there was no article known by that denomination in the trade, or in the shops where white lead is usually sold, and the finest white lead which could be obtained would not answer the purpose; the Court, upon a motion to dissolve an injunction which had been obtained *ex parte*, held that the specification was insufficient, observing that it was a principle of patent law that there must be the utmost good faith in the specification; that it must describe the invention in such a way that a person of ordinary skill in the trade should be able to carry on the process; and here the specification says, that there is to be added to the size certain proportions "of the finest and purest chemical white lead;" that a workman would naturally go to a chemist's shop, and ask for the "finest and purest chemical white lead," and that the answer which he would receive would be that there was no substance known in the trade by that name; and that he would be compelled to ask for the purest and finest white lead, and that, according to the evidence, the purest and finest white lead that could be procured in London would not answer the purpose (1).

51. Where a patentee obtained an interlocutory injunction upon motion, the defendant, not appearing, but ceasing thenceforward to do the acts complained of as an infringement, and the defendant having answered, both parties examined witnesses, and the case was brought to a hearing without a preliminary trial of the right at Law; the Court, being of opinion that there was a sufficient case for protecting the plaintiff's right, subject to its establishment at Law, but not a case entitling the plaintiff to a perpetual injunction without the establishment of the right at Law, retained the bill for a year, to give the patentee an opportunity of establishing his right at Law (2).

(1) *Sturz v. De la Rue*, 5 Russ. 322; 7 L. J. (Ch.) 47.

(2) *Ward v. Key*, 10 Jur. 792.

52. The Court will not make an order for costs where it is probable that proceedings in the cause may afterwards take place which will affect the decision of the Court upon the question of costs. Therefore where a bill to restrain the infringement of a patent was retained at the hearing, to give the patentee an opportunity of trying the right at Law, the Court refused to make an order as to the costs of the evidence, which were claimed by the plaintiff on the ground that the defendant had not required him to establish his title at Law (1).

53. Where judgment was given by consent before declaration in an action by a patentee against the members of a partnership for an infringement, and the validity of the patent was not put in issue in the action, and they immediately took a license to use the invention, and a suit to restrain a subsequent alleged infringement having been instituted by the patentee, after the expiration of the license, against the same members, and two fresh partners; Vice-Chancellor Sir W. P. Wood held, that the defendants in Equity were not estopped by the judgment at Law from contesting the validity of the patent. The Vice-Chancellor said, that in order to effect an estoppel it was necessary that it should appear on the record that the question had been put in issue, and that in any case he could not prevent the defendants, who were not parties to the action at law, from setting up this defence (2).

54. Vice-Chancellor Sir J. Stuart said, in *Young v. Fernie* (3), that inventions in mechanics are as widely different from inventions in economical chemistry as the laws and operations of mechanical forces differ from the laws of chemical affinities and the results of analysis and experiment in the comparatively infant science of chemistry, with its boundless field of undiscovered laws and undiscovered substances; where, therefore, prior to the date of a patent, something necessary for the useful application of a chemical discovery for manufacturing purposes remained to be discovered, which the plaintiff's invention supplied; Vice-Chancellor Sir J. Stuart held, that the manufacture with the materials and processes in the

If prior to the patent, something necessary for the useful application of a chemical discovery re-

mained to be discovered, and plaintiff's invention supplied it, the manufacture, &c., is a "new manufacture," &c.

(1) *Ward v. Key*, 10 Jur. 792.

(N. S.) 107.

(2) *Goucher v. Clayton*, 11 Jur.

(3) 4 Giff. 577; 12 W. R. 901.

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The law recognises as an invention an article found out for commercial purposes known only before as a chemical curiosity.

specification was a "new manufacture not in use" at the date of the patent (1). The law recognises the right of an inventor who finds out and supplies for commercial purposes an article known previously only as a chemical curiosity (2).

55. The Court looks with distrust on experiments conducted with a view to litigation (3).

If, with a particular purpose in view, the general principles of mechanics are applied to a manufacture, this warrants an application for a patent, if manufacture be new, desirable, and of public utility.

56. If, having a particular purpose in view, a person takes the general principles of mechanics, and applies one or other of them to a manufacture to which it has not before been applied, this is sufficient ground to warrant an application for a patent, assuming such manufacture to be new, desirable, and of public utility (4).

If validity of patent and infringement established and proved—plaintiff is entitled to an account of profits—and an inquiry as to damages.

57. Where a suit had been instituted by a patentee to restrain the defendants from infringing his patent, and asking for an account of profits made by the defendants by sale or manufacture of the materials which formed the subject of the patent, and the validity of the patent, and the fact of infringement by the defendants, had been decided in the plaintiff's favour by the Court, without a jury, and the plaintiff asked, at Bar, for damages, or for an account of the profits of which he had been deprived by reason of such infringement; Vice-Chancellor Sir W. P. Wood directed an account of profits made by the defendants by the infringement, and an inquiry what sum ought to be paid by the defendants in respect of the damage sustained by the plaintiff (5).

The 21 & 22 Vict. c. 27, as to damages, applies to infringement of patents.

58. The jurisdiction conferred by 21 & 22 Vict. c. 27, of awarding damages in suits to restrain the commission of wrongful acts, applies to the case of suits to restrain the infringement of patents; and the circumstance that the Court was in the habit, before the Act, of affording a partial remedy in such suits by directing an account of profits, constitutes no ground for excluding the jurisdiction newly conferred (6).

The temporary user of an English

59. It is sufficient to constitute user of a patented article, that the same sort of benefit, however temporary and indirect has been

(1) 4 Giff. 577; 12 W. R. 901.

(N. S.) 142.

(2) *Ib.*

(5) *Betts v. De Vitre*, 11 Jur. (N.S.) 9.

(3) *Ib.*

(6) *Ib.*

(4) *Dangerfield v. Jones*, 13 L. T.

in fact derived from it as would arise from it in its ordinary use; it is immaterial whether the use of the article is active or passive (1). And where ale was sent from Scotland to England, for transhipment to India, in bottles covered with capsules made abroad, according to a mode of manufacture patented in England only, the Lords Justices held, affirming the decision of Vice-Chancellor Wood granting an interlocutory injunction, that the transitory resting in England of the bottles so covered constituted a user in infringement of the English patent (2). In this case B. was a patentee of the article, a substance for making capsules to cover the mouths of bottles so as to render them air-tight; and A., a brewer in Scotland, to which country the patent did not extend, sent to an English port for shipment to his foreign customers bottles of beer covered with similar capsules made abroad; the Lords Justices held, that since the capsules during the time of the bottles being in England were answering the purpose for which they were intended—of preserving the liquor—there was a user of the invention in England which ought to be restrained by injunction (3).

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patented
article in transi-
tion through
England, is an
infringement
of the patent.

60. Though the manufacture in this country of the several parts of a patented machine, and the exportation of those parts may not be an infringement of the patent, the machine being the novelty, and the parts being old, it is otherwise where the part exported is itself the patented invention (4).

61. A plaintiff in a suit to restrain an infringement of a patent who has filed a replication is not, where the Court has refused to direct issue, entitled to require the defendant, by analogy to the practice at Law, to deliver particulars of his objections to the validity of the patent (5).

Plaintiff who
has filed repli-
cation, not
entitled in
this Court to
require deli-
very of par-
ticulars of objections to validity.

62. In a patent case evidence cannot be given on the trial of an issue in respect of objections not specified in the particulars required to be delivered under 15 & 16 Vict. c. 83, s. 41, even though the evidence was not discovered till after the delivery of

Evidence can-
not be given
in respect of
objections not
specified in
particulars,
unless with
special leave.

(1) *Betts v. Neilson*, 3 De G. J. & S. 82; L.R. 3 Ch. 429; 34 L. J. (Ch.) 537; 11 Jur. (N. S.) 679; 13 W. R. 804.

(2) *Ib.*

(3) *Ib.*

(4) *Goucher v. Clayton*, 11 Jur. (N. S.) 462.

(5) *Bovill v. Goodier*, L. R. 1 Eq. 35; 11 Jur. (N. S.) 900.

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the particulars; but a specific motion must be made for leave to put it in (1).

Defendant
can be ordered
to verify kinds
of machines
sold, and pro-
duce one of
each for
inspection.

63. In a suit to establish the validity of a patent to restrain infringement, upon an application by the plaintiff for an inspection of all the sewing machines of every kind on the defendant's premises, the defendant was ordered to verify the several kinds of sewing machines which he had sold or exposed for sale, and to produce at his solicitor's office one of each class for inspection by the plaintiff's solicitor and two of their scientific witnesses (2).

Neither party
has a right,
*ex debito jus-
titiae*, to have
issues of fact
referred to a
jury.

But if a really
doubtful ques-
tion at issue,
Court will
direct a jury
if either party
requires it.

64. Neither defendant nor plaintiff in a suit to restrain an infringement of a patent has any right to have the issues and questions of fact referred to and tried by a jury *ex debito justitiæ*, and where the issues raised have been already determined, such reference will in general be refused; but if it appears that there is a really doubtful question at issue, the Court will not decide it for itself if either party desires a jury (3).

65. Where an agreement was entered into between K. and P. that K. should take out a patent for purifying paraffine and assign it to P.; that P. thereupon would work it for fourteen years, if it could be so long worked with profit, and would not purify paraffine by any other process, and would pay to K. a royalty; that P. would keep accounts of all paraffine purified according to the patent, and that the provisions of this agreement, and all other provisions usual and proper in such deeds, should be incorporated in the deed of assignment of the patent, to be prepared by counsel agreed on by the solicitors of the parties; and the patent was taken out, and P. commenced working under it, but shortly afterwards abandoned the use of the process, alleging that it could not be worked at a profit, and refused to pay any royalty; and K. thereupon brought an action for royalties and recovered judgment; and pending this action P. gave notice to determine the agreement because the invention could not be worked to a profit; and K., after obtaining judgment, filed his bill asking for an account of subsequent royalties, an injunction to restrain the defendant from

(1) *Daw v. Eley*, 11 Jur. (N. S.) 923.

(2) *Singer Manufacturing Company v. Wilson*, 13 W. R. 560.

(3) *Davenport v. Goldberg*, 2 H. & M. 282; *Bovill v. Hitchcock*, L. R. 3 Ch. 417; 16 W. R. 321; 37 L. J. (Ch.) 223.

purifying paraffine under any other process, and for a reference to chambers to settle a proper deed of assignment, or if the Court should hold the agreement to have been determined, then for relief against the defendant as an infringer of the patent; the Court held that in a case of this nature it was in the discretion of the Court whether it would direct an account or leave the parties to their remedy at Law; and that the account being only a part of an agreement, which the Court could not wholly enforce, the plaintiff ought to be left to his remedy at Law, and that for the same reason the execution of the assignment ought not to be decreed (1).

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Where the account asked was only part of an agreement which the Court could not wholly enforce, the plaintiff was left to his remedy at Law.

66. Where the directors of a limited company, and acting as its agents, infringed a patent and were made defendants, together with the company, to a suit the bill in which prayed for an injunction and costs, the Court held that the decree must be made against the directors as well as the company, and that the directors were personally liable to pay the costs (2); and directors of a company are personally responsible for the infringement of a patent by their workmen, notwithstanding such infringement may be in contravention of orders. And see this case (3) for the form of an order for a perpetual injunction to restrain defendants from further infringement of patent as to costs personally against directors of a limited liability company, and as to accounts and inquiries to ascertain damages sustained by a patentee in consequence of the infringement of his patent.

If directors of a limited company infringe a patent, the decree will be against them as well as the company—and the directors personally liable to costs.

67. Where a bill prayed for an injunction against the infringement of a patent by the defendant, for an account of profits, and for damages, and after the filing of the bill, but before the hearing of the cause, the patent expired; the infringement being proved, Vice-Chancellor Wood held, that, notwithstanding the rule—no injunction no account—its jurisdiction related back to the time of the filing of the bill, and awarded damages under Sir H. Cairns' Act (21 & 22 Vict. c. 27) (4); and in directing an inquiry as to what damage the plaintiff had sustained the Vice-Chancellor said, that

Though the patent expire before the hearing of cause, the jurisdiction relates back to filing bill, and plaintiff is entitled to an inquiry as to damages. Form of the inquiry.

(1) *Kernot v. Potter*, 3 De G. F. & J. 447.

(3) 11 Jur. (N. S.) 217.

(2) *Betts v. De Vitre*, 11 Jur. (N. S.) 9; 37 L. J. (Ch.) 325; L. R. 3 Ch. 429; 18 L. T. (N. S.) 165; 16 W. R. 529.

(4) *Davenport v. Lylands*, L. R. 1 Eq. 302; 35 L. J. (Ch.) 204; 14 W. R. 243.

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the inquiry would be in the form, "what damage the plaintiff had sustained," and not "what damage, if any," he had sustained, as it would be in the case of a trade mark; and that there was this difference between the case of a trade mark and that of a patent: that in the former case the article sold is open to the whole world to manufacture, and the only right the plaintiff seeks is that of being able to say, "Don't sell any goods under my mark;" that he might find his customers fall off in consequence of the defendant's manufacture, but that it does not necessarily follow that the plaintiff can claim damages for every article manufactured by the defendant, even though it be under that mark; that, on the other hand, every sale without license of a patented article must be a damage to the patentee; and the Vice-Chancellor said, that the inquiry must extend to the sale by the defendants of any articles manufactured by them within six years before the filing of the bill, and up to the expiry of the patent, by that process the exclusive use of which was secured by the letters patent mentioned in the bill (1). But where F. obtained a patent for umbrella ribs, and enjoyed it uninterruptedly to its conclusion, with the exception of an action for damages by another patentee, who recovered £300, and a manufacture and sale of the ribs by D. & D. six months before it expired; and F. filed a bill and restrained D. & D., and the cause came to a hearing nine months after the expiration of the patent; Vice-Chancellor Sir W. P. Wood held, that the Court could direct an account notwithstanding the expiration of the patent, but that it must be in a case where there was no doubt as to its validity (2); but that F's invention was neither novel nor important, the two requisites to support a patent, and that the bill must therefore be dismissed with costs (3).

68. The right to full costs given by 15 & 16 Vict. c. 83, s. 43, to a patentee, when the validity of his patent has been established in a prior suit, exists, notwithstanding the fact that the validity of the patent is not questioned in the subsequent suit (4).

69. *Semble, per* Lord Chancellor Chelmsford, that on an issue

(1) *Davenport v. Rylands*, L. R. 1 15 W. R. 194.

Eq. 302; 35 L. J. (Ch.) 204; 14 W. R. (3) *Ib.*

243.

(4) *Davenport v. Rylands*, L. R. 1 Eq.

(2) *Fox v. Dellestable, Fox v. Jones*, 302; 35 L. J. (Ch.) 204; 14 W. R. 243.

whether the specification did "particularly describe and ascertain the nature of the invention," the question of variation between the provisional and complete specification may be gone into (1).

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70. After the law officer of the Crown has allowed a provisional specification it is no longer open to objection on the ground of mere generality, although a departure in the complete specification from a description in the provisional one will invalidate the patent (2). But where a provisional specification described an invention as consisting in "the employment of wood in the bearings and bushes of screw and submerged propellers," and the complete specification explained the mode of performing the invention to be the fixing pieces of wood in slots cut in the bearings, so as to prevent the latter from touching the screw shaft, open spaces being left between the pieces of wood, through which the water would flow freely and lubricate the shaft, which latter result was the essence of the invention; the Court held, that this was no departure from the provisional specification (3).

After a provisional specification has been allowed, it is no longer open to objection on ground of mere generality.—A departure from the description in provisional one, invalidates patent.

71. An objection to the validity of the patent on the ground of the expiration of a foreign patent for the same invention, cannot be taken at the hearing of a suit to restrain the infringement of the patent, unless it has been raised by the answer (4).

72. Where a plaintiff files his bill for an injunction to restrain a defendant, the maker of a similar description of articles in trade as himself, which he had designated as patent, from selling those articles, the plaintiff's articles not being, in fact, protected by any patent right, the bill will be dismissed with costs (5).

A bill filed to restrain sale of articles designated by plaintiff patent, but not being so, will be dismissed with costs.

73. Where an interlocutory injunction to restrain an infringement of a patent was moved for in a suit in which the bill was filed in July, and it appeared that the plaintiff wrote complaining of the infringement in the preceding November, and knew of the defendant's proceedings in the previous August, Vice-Chancellor Sir W. P. Wood refused the interlocutory injunction on the ground of delay (6).

Interlocutory injunction refused on ground of delay in filing bill (here) eleven months.

(1) *Penn v. Jack*, *Penn v. Bibby*, 15 W. R. 208. (4) *Bovill v. Goodier*, L. R. 2 Eq. 195.

(2) 1b. (5) *Morgan v. M'Adam*, 15 L. T. (N. S.) 348.

(6) *Bovill v. Orate*, L. R. 1 Eq. 388.

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Exclusive licensees can maintain suit in name of patentee, and obtain injunction, although owners of patent assign their interest after bill filed.

Where novelty denied, plaintiff no right to discovery of particulars as shewing user prior to the patent.

Where the issues have all been found in favour of patentee, he has a right to an immediate decree, notwithstanding appeals to the House of Lords have been lodged.

Defendant infringing in ignorance, but submitting, and offering before suit to pay profits made—though perpetual injunction, yet no costs given, and the account at plaintiff's peril.

74. An exclusive licensee of a patent has a right to use the name of the patentee to restrain any infringement of the patent, and the Court, in *Renard v. Levinstein* (1), granted an injunction to restrain an infringement of a patent, at the suit of the exclusive licensees of the patent, their co-plaintiffs, the owners of the patent, having since the bill was filed assigned all their interest in the patent; and it is no sufficient answer to a motion for an interlocutory injunction in such a case that the party has volunteered to keep an account (2).

75. A plaintiff in a patent case, where the novelty of the invention is denied by the answer, has no right to a discovery of the particulars on which the defendant relies, as shewing a user of the thing patented prior to the date of the patent (3); and so, in such a case, the plaintiff is not entitled to discovery from the defendant in answer to a general interrogatory as to the instances of prior user on which he relies (4).

76. Where the issues directed to be tried in a suit to restrain an infringement of a patent have all been found in favour of the patentee, the circumstance that appeals to the House of Lords have been lodged will not be allowed to interfere with his right to an immediate decree. And where there had been a trial before the Vice-Chancellor without a jury, in which issues were found for the plaintiff, and a motion for a new trial having been refused by the Vice-Chancellor, and on appeal refused by the Lord Chancellor, was being taken by appeal to the House of Lords; the Court declined to suspend the final order for an injunction pending the appeal to the House of Lords (5).

77. Where a defendant having, in ignorance, infringed the plaintiff's patent, submitted, and offered, before suit, to pay the amount of profits made, which were very trifling; at the hearing, though a perpetual injunction was granted, no costs were given, and an account was granted only upon the plaintiff's request, and at his peril (6).

(1) 2 H. & M. 628; 13 W. R. 382.

(2) *Ib.*

(3) *Daw v. Eley*, 2 H. & M. 725.

(4) *Bovill v. Smith*, L. R. 2 Eq. 459.

(5) *Penn v. Bibby*, L. R. 3 Eq.

308; 36 L. J. (Ch.) 277; *Id.*, and *Penn*

v. Jack, and *Penn v. Fernie*, 15 W. R.

192.

(6) *Nunn v. D'Albuquerque*, 34 Beav. 595.

78. Where W. took out a patent for improvements in ladies' veils, consisting in the folds being the same on both sides instead of as theretofore made, one side having been a wrong side, and R. bought the patented articles of W. for some time, but ultimately employed a manufacturer of veils, who supplied him with 174 dozen veils identical with those of W., and admitted to be made after the pattern of one of them; on a bill for an injunction to restrain the manufacturing and selling, and infringement of the patent, Vice-Chancellor Sir R. Malins held, that there was no proper subject for a patent, and dismissed the bill, but without costs (1).

79. Where an inventor took out a patent in France, and subsequently an English patent, the subject matter of which was wholly included in the French patent, and he afterwards allowed the French patent to drop, by default in paying the annual dues required by the French law to keep it alive; and accordingly this patent was, by a judgment of *dechéance* pronounced by a French Court, in February 1866, declared void as from February 1864; and in March 1865, a bill was filed by the assignee of the English patent to restrain the defendant from infringing it; and in January, 1866, a decree was made establishing the patent and awarding an injunction; on motion, in 1867, to commit the defendant for breach of this injunction, Vice-Chancellor Sir W. P. Wood held, first, that the inventor's English patent being identical with his French patent, it was by force of the 15 & 16 Vict. c. 83, s. 25, determined in this country from February 1866, the date of the annulment of the French patent, but not sooner; secondly (the injunction granted in January, 1866, being only co-existent with the patent expired when the patent was determined), that although the French patent was declared void as from a date anterior to the decree, yet the defendant was not estopped by the decree from raising this defence on the motion; and, thirdly, that the judgment of the French Court given in the presence of the inventor was binding on his assignee; and the Vice-Chancellor held, that the 15 & 16 Vict. c. 83, s. 25, applies where a foreign patent is *de facto* granted, though it is afterwards cancelled *ab initio* (2).

An English patent identical with a French patent is, by force of sect. 25 of 15 & 16 Vict. c. 83, determined from the date of the annulment of the French patent.

(1) *White v. Toms*, 17 L. T. (N. S.) 348; 37 L. J. (Ch.) 204.

(2) *Daw v. Eley*, L. R. 3 Eq. 496; 36 L. J. (Ch.) 482; 15 L. T. (N. S.) 559.

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In bills
against both
manufacturer
and party
using the
article, plain-
tiff has a right
not only to an
account
against manu-
facturer, but
damages
against person
using article.

Patentee
must prove
unauthorized
user.

No relief
where patent
has practi-
cally expired.

80. Where bills in Equity to restrain the infringement of a patent have been filed against both the person who manufactures and the person who uses the article, and issues of fact have been found for the plaintiff, it is the right of the plaintiff to have not only an account against the manufacturer, but also damages against the person using the article wherever it may be found (1).

81. Where in a suit to restrain the infringement of a patent issues are directed, and the judge certifies that the validity of the letters patent came in question, the plaintiff cannot at the hearing of that suit have more than party and party costs, the provisions of the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), s. 43, applying only to subsequent actions or suits, and not to the costs of a first trial, whether at Law, or of issues of fact in this Court, but only to the costs of a second trial upon production of the record of the first trial with the certificate indorsed (2).

82. A patentee must prove not only a user of his patent, but that the user was unauthorized; and when a man himself disposes of articles abroad very clear proof will be required that with the goods he did not also transfer to the purchasers leave and license to use them as they thought fit; and the fact that he gave a mere general injunction to his agents not to sell in England will not be sufficient (3).

83. A patentee cannot maintain a suit in Equity against a retail dealer who innocently sells articles which are an infringement of his patent, provided such retail dealer gives full information as to the persons from whom he obtained the articles complained of, and promises not to retail any more; and where the patent has expired, and the infringement is innocent, accidental, and trivial, a bill for an injunction will be dismissed (4).

84. The importation of an article manufactured abroad, but protected by English letters patent, is an infringement of the English patent (5).

85. Courts of Equity will not entertain a patent suit when the bill is filed so shortly before the expiration of the patent that it is

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| (1) <i>Penn v.</i> | { <i>Bibby,</i>
<i>Jack,</i>
<i>Fernie,</i> | } L. R. 3 Eq. 308; 36
L. J. (Ch.) 277. | (3) <i>Betts v. Willmott</i> , L. R. 6 Ch.
239; 19 W. R. 369. |
| | | | (4) <i>Betts v. Willmott</i> , 18 W. R.
946. |
| (2) <i>Ib.</i> | | | |
| (5) <i>Elmslie v. Boursier</i> , | | | L. R. 9 Eq. 217; 18 W. R. 665; 39 L. J. (Ch.) 328. |

impossible for the plaintiffs to obtain any relief except damages; and where a prolonged term expired on the 12th of January, 1868, and on the 8th of January the plaintiff filed his bill in this case for an injunction, and an account of profits, or an inquiry as to damages, Vice-Chancellor Sir W. M. James said he entirely agreed with the present Lord Chancellor Hatherley's remarks in *Davenport v. Rylands* (1), but that they were never intended to apply to a case in which for all practical purposes the patent had expired before the bill was filed; that the bill was filed when everybody must have known that it was impossible the plaintiff could obtain any equitable relief whatever; that there could not possibly be time to get an injunction, and that the plaintiff could only obtain damages, which were properly sought by an action at law; and that the bill was an attempt to transfer that jurisdiction to this Court, and he dismissed the bill with costs (2).

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86. Where a patentee, acting through his solicitor, assigned the sole benefit of his patent, and the solicitor neglected to register, in pursuance of s. 35 of the Patent Law Amendment Act (15 & 16 Vict. c. 83), the assignment, and the patentee proceeded to assign, with notice of the prior assignment, the benefit of his patent to other persons, and after a bill had been filed by the original assignee the deed was registered; Vice-Chancellor Sir R. Malins held, that the patentee was bound by the act of his solicitor, and could not take advantage of his solicitor's omission, that such a course would be contrary to all the principles of Equity. And the Vice-Chancellor said, that if it were necessary to decide it he should probably hold that the registration in this case related back, so as to enable the plaintiff to come here (3).

Patentee is bound by acts of his solicitor, and cannot take advantage of his neglect to register the assignment.

87. Under a patent for an arrangement and combination of parts, protection will not be given against the use of any particular part which is not novel, and the adaption of a sliding door to a spherical lamp, sliding doors having previously been applied to cylindrical lamps, and to other glazed surfaces, cannot of itself be the subject of a patent (4).

A patent for an arrangement and combination of parts, does not protect a part not novel.

(1) L. R. 1 Eq. 302; 14 W. R. 243.

(2) *Betts v. Gallais*, 18 W. R. 945.

(3) *Hassall v. Wright*, L. R. 10 Eq. 509; 18 W. R. 821.

(4) *Parke v. Stevens*, L. R. 5 Ch.

36; L. R. 8 Eq. 358; 18 W. R. 233;

22 L. T. (N. S.) 635; 38 L. J. (Ch.) 627.

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88. A patent for improvements will not be bad on the ground of prior user, though previous use be proved of an article of the same kind, with appendages exactly answering the words of the specification, if the appendages to the article previously used had a different object to that of the patented improvements and did not produce the same effect; and under these circumstances the specification is not bad for being too extensive, and including the article previously used, provided the description and diagrams are such as to enable any workman of ordinary intelligence to produce at once the article intended to be patented (1).

89. A specification may consist partly or entirely of a drawing (2).

The use of a new material to produce a known article, does not entitle to a patent, unless invention displayed.

90. Where the plaintiff had obtained a patent for the use of animal fibre, by preference Russian wool, or wool of a coarse texture, in the manufacture of artificial hair to be made up as ladies' head-dresses, and for upholstery, and other like purposes; upon bill filed to restrain an infringement, Vice-Chancellor Sir R. Malins held, that the specification was too extensive; that even the use of a new material to produce a known article could not be the subject of a patent unless some invention and ingenuity were displayed in the adaptation; that in this case a prior user of wool for the same purpose was proved by the evidence, and that the bill must be dismissed with costs (3).

A specification does not differ from any other publication of an invention.

91. Publication of an invention in terms of mere generality, or not true to their full extent, will not invalidate a subsequent patent the specification of which is limited and accurate, and gives a specific rule of practical application. And a prior publication to have that effect must be one from which a person with ordinary knowledge would be able practically to apply the discovery without further experiment; if something remains to be ascertained there is room for another valid patent. And a specification of a patent does not differ from any other publication of an invention for the purpose of invalidating a subsequent patent for the want of novelty (4). The question of the identity of two specifications for the purpose

(1) *Poupard v. Fardell*, 18 W. R. 127; 21 L. T. (N. S.) 696.

(2) *Ib. overruling Ex parte Fox*, 1 V. & B. 67.

(3) *Rushton v. Crawley*, L. R. 10 Eq. 522.

(4) *Hills v. Evans*, 4 De G. F. & J. 288; 31 L. J. (Ch.) 457.

of deciding as to the novelty of an invention, is one of fact, to be left to the jury (1).

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92. A manufacturer who professes to sell to the public a machine under his own name, as one with all the newest improvements, will not be restrained from selling it on an allegation that it is an infringement of the plaintiffs' patent for a machine which was an old machine, but which had not the modern improvements to it (2).

93. When a patentee has taken out a fresh patent for improvements on his original invention, it is sufficient if, reading his second specification with the first, an artisan would have no substantial difficulty in ascertaining what was claimed (3).

94. In a bill to restrain an infringement of a patent an express averment of the novelty of the invention protected by the patent is not necessary (4).

Express aver-
ment of
novelty not
necessary in
bill.

95. On an issue directed in a patent suit on the question of novelty, the proper form is to direct two issues: one newness of manufacture, the other newness of invention (5).

96. A plaintiff in a patent suit is bound to answer all the interrogatories of a defendant which are fairly calculated to shew that the patent is not a good patent, or that that which a plaintiff alleges to be an infringement is not an infringement (6).

97. When a defendant to a suit in which replication is filed has given evidence of instances of prior user not mentioned in his answer, and leave has been granted to the plaintiff, on the ground of surprise, to adduce fresh evidence to disprove these instances, the defendant will not necessarily be entitled to bring further evidence to rebut the fresh evidence so adduced by the plaintiff, the defendant's counsel not being able to specify any point on which fresh evidence was required (7).

98. A prior publication will not invalidate a patent unless it has

(1) *Hills v. Evans*, 4 De G. F. & J. 663; 38 L. J. (Ch.) 593; 17 W. R. 288; 31 L. J. (Ch.) 457. 849; 20 L. T. (N. S.) 654.

(2) *Willcox and Gibbs Sewing Machine Company v. Wood*, 20 L. T. (N. S.) 10. (5) *Spencer v. Jack*, 3 De G. J. & S. 346.

(3) *Parkes v. Stevens*, 38 L. J. (Ch.) 901; 20 L. T. (N. S.) 893.

627; L. R. 8 Eq. 358; 17 W. R. 846. (7) *Poupard v. Fardell*, 18 W. R. 59.

(4) *Amory v. Brown*, L. R. 8 Eq.

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imparted information so as to enable any one working upon it to reckon with confidence on the result (1). And in order to establish the prior public use of a patented article so as to invalidate the patent, it is not necessary to shew that the article had been manufactured for sale (2).

99. The specification of a patent may describe the process to be adopted so insufficiently as to invalidate the patent, and yet disclose enough to shew that what is claimed by a subsequent patent is not new (3); but whether a specification contains a sufficient description can only be ascertained by experiment; and in making the experiment knowledge and means may be employed which have been acquired since the date of the patent (4).

100. The Court of Chancery has jurisdiction under 21 & 22 Vict. c. 27, to award damages for the infringement of a patent in addition to directing an account of profits, and this although damages may not be specifically prayed for by the bill (5).

101. A patentee of an invention applicable to part of a machine who, himself a manufacturer, has been in the habit of licensing the use of his invention by other manufacturers on payment of a fixed royalty for each machine, who has obtained against an infringing manufacturer a decree for damages, "by reason of the user or vending" of the invention, is not entitled to claim, by way of damages, any sum beyond the ordinary royalty (6). Therefore he is not entitled to claim, in addition to his ordinary royalty, a manufacturing profit; and, *a fortiori*, not such a manufacturing profit as he would have made if every unlicensed machine had been sent to him to be fitted with the invention (7); but otherwise if he had been in the habit of charging infringers with a higher royalty than ordinary licensees (8). And where a plaintiff having, in another suit, obtained a decree against certain wrongful users (not being manufacturers) of unlicensed machines fitted by the defendant with his invention, had in some instances been paid his

(1) *Betts v. Neilson*, L. R. 3 Ch. 429;
3 De G. J. & S. 82; 37 L. J. (Ch.) 321;
18 L. T. (N. S.) 165.

(2) *Ib.*

(3) *Betts v. Neilson*, L. R. 3 Ch. 429;
37 L. J. (Ch.) 321; 18 L. T. (N. S.)
165; 16 W. R. 524.

(4) *Ib.*

(5) 37 L. J. (Ch.) 321; L. R. 3 Ch.
429; 16 W. R. 524.

(6) *Penn v. Jack*, L. R. 5 Eq. 81;
37 L. J. (Ch.) 136; 16 W. R. 243; 17
L. T. (N. S.) 407.

(7) *Ib.*

(8) *Ib.*

ordinary royalty by such users; the Court held, that in every such instance, no further royalty was payable by the manufacturer.

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102. The Court, before it will grant an inspection of the defendant's process by which an alleged infringement was to be made out, must be satisfied that the plaintiff has made out such a case that at the hearing of the cause he will obtain the relief prayed, and that the inspection required by him of the defendant is material to such a case (1).

No inspection unless a case for relief is made out, and that inspection is material.

103. If, from the various transfers of a patent right, it is doubtful whether an action at law can be effectually brought, Equity will take jurisdiction (2). And where sufficient possession is made out, a doubt as to the validity of the patent will not necessarily prevent an injunction. The Court will look to the circumstances, and the comparative inconvenience or loss to be occasioned by granting or withholding it (3). So, where a Court of Equity, having heard a case on full proofs, is well satisfied of the originality of an invention, the regularity of the patent, and the fact of infringement, it will not send the case to a jury prior to granting a perpetual injunction. Especially if the questions in the case, though questions of fact, are such as the Court can decide upon the testimony of men of science as well as, or better than, a jury; and where a jury-trial would be long, costly, or troublesome (4).

Where sufficient possession, a doubt as to validity does not necessarily prevent injunction.

Court of Equity will not send case to a jury if satisfied of originality, &c.

104. Equity will not enjoin the equitable owner of a patent on petition of the legal owner (5).

105. Before a patentee can have an injunction, he must shew an exclusive enjoyment long enough to justify the presumption of a right, or an incontestable right (6).

106. Where one of three parties runs a machine, and the other two own it, all may be enjoined (7). So the directors of a company which manufactures articles that infringe a patent, who have the management of the business, and under whose direction the

(1) *Pigott v. Anglo-American Telegraph Company*, 19 L. T. (N. S.) 46.

Clum v. Brewer, 1b. 506; *Woodworth v. Stone*, 3 Story, 749.

(2) *Bicknell v. Todd*, 5 M'L. 236 (Amr.)

(5) *Clum v. Brewer*, 2 Curt. 506 (Amr.)

(3) *Sargent v. Seagrave*, 2 Curt. 553 (Amr.)

(6) *Thomas v. Weeks*, 2 Paine, 92 (Amr.)

(4) *Goodyear v. Day*, 2 Wall. Jun. 283. See *Washburne v. Gould*, 3 Story, 122; *Sargent v. Larned*, 2 Curt. 340;

(7) *Woodworth v. Edwards*, 3 W. & Min. 120 (Amr.)

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SECT. 1.

License from
plaintiff suffi-
cient to dis-
solve injunc-
tion.

articles are made and sold, and the company's agents, are responsible for the infringement, and may be restrained by injunction (1).

107. A license from the plaintiff, appearing by the answer, is sufficient ground for dissolving an injunction against the infringement of a patent (2).

SECT. 2. *Copyright.*

There is a
copyright in a
catalogue,
unless a mere
dry list.

1. There is copyright in a catalogue, unless it is a mere dry list of names, or dry list of books—catalogues *per se*—and it is no defence to say that the pirated work is not offered for sale itself, but merely used to promote the sale of the books mentioned in it (3).

What is a fair
use of other
works of same
kind.

And the Vice-Chancellor (Sir W. P. Wood) said that the only fair use you can make of the work of another of this kind is, where you take a number of such works, catalogues, dictionaries, digests, &c., and look over them all, and then compile an original work of your own founded on the information you have extracted from each and all of them; but that it was of vital importance that such new work should have no mere copying, no merely colourable alterations, no blind repetition of obvious errors; and that he found all these things here. Again, that it was of great importance, as evidence of *bona fides*, that the original manuscript should be produced, and that that decided him in favour of the defendant in the French dictionary case (4), that he saw that he had bestowed great pains and labour on his subject; and though he had certainly copied a great deal from the plaintiff, he, the Vice-Chancellor, was convinced that the defendant there had honestly exercised his mind upon his work, and that here he thought there had been wholesale piracy. In this case a bookseller, H., had written and published a descriptive catalogue of books, and another bookseller, A., published a descriptive catalogue in which many of the descriptions were copied verbatim from H.'s catalogue; the Court held, that such copying was an infringement of his copyright, and that he was entitled to an injunction accordingly.

The produc-
tion of the
original MSS.
is important
evidence of
bona fides.

(1) *Goodyear v. Phelps*, 3 Blatch. p. 481-489.

C. C. 91 (Amr.)

(3) *Hotten v. Arthur*, 1 H. & M.

(2) *Goodyear v. Bourn*, 3 Blatch.
266 (Amr.); Hilliard, Inj. 2nd Ed.,

608; 32 L. J. (Ch.) 771.

(4) *Spiers v. Brown*, 6 W. R. 352.

2. If any person by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads and in a scientific form, is sufficient to constitute an original work, of which the copyright will be protected (1). But another person may originate another work in the same general form, provided he does so from his own resources, and makes the work he so originates a work of his own, by his own labour and industry bestowed upon it (2). And in determining whether an injunction should be ordered the question, where the matter of the plaintiff's work is not original, is, how far an unfair or undue use has been made of the work (3). If, instead of searching into the common sources and obtaining your subject matter from thence, you avail yourself of the labour of your predecessor, adopt his arrangement and questions, or adopt them with a colourable variation, it is an illegitimate use of another man's work; and falsely to deny that you have copied or taken any idea or language from any other work is a strong indication of *animus furandi* (4). In this case the plaintiff had published a book called 'Why and Because,' treating of the scientific explanations of various common phenomena of life, and the defendant afterwards published a work on similar subjects, called 'The Reason Why,' of which the plaintiff complained that the name and the plan were suggested by his own work, and the arrangement and phraseology in many instances taken bodily from his work; and Vice-Chancellor Sir W. P. Wood held, first, that there was no such similarity or colourable imitation in the title as to support the plaintiff's claim for an injunction against *that*, and that the method of communicating information by question and answer being of unknown antiquity, the plaintiff could not claim any originality in the plan of his work; and further, that many of the questions in the plaintiff's book being the simplest

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The reduction of questions of ordinary persons and answers furnished from recollection, or out of works, under heads, and in a scientific form, constitute an original work, of which the copyright will be protected. But another may originate another work in same general form from his own resources.

Falsely to deny having copied or taken any idea or language from another work, is strong indication of *animus furandi*.

(1) *Jarrold v. Houlston*, 3 K. & J. 708; 3 Jur. (N. S.) 1051.

(2) *Ib.*

(3) *Ib.*

(4) *Ib.*

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What is a fair use by a subsequent compiler of a prior author's work of compilation.

It is piracy to take matter in a prior work borrowed from authorities open to all, to save labour and expense of consulting originals.

Publication of the chapters containing the piracies restrained, Court being unable (here) to obtain from defendant the *quantum*.

The Court will not grudge any labour to ascertain how far injunction should extend.

The proprietor of a periodical is precluded from republishing articles written for that periodical, except as

forms in which the questions could be asked, were not the subject of copyright, and could not be the privilege of the plaintiff; yet that arrangement of questions and answers, however simple in themselves, and on subjects however common, might be the subject of copyright (1). And where two authors, A. and B., treat of the same subject, each being merely a compiler from various other original works, it is a fair use of A.'s work if B. examine it for the purpose of seeing what works unprotected by copyright were referred to by A., and B. may then himself refer to such unprotected work, and take from it whatever may be suggested by A.'s book; and it is also a legitimate use of A.'s work if B., after having, by his own labour, brought his own work into shape, refer to A.'s work to supply omissions; but it is a piratical use of A.'s work if B. take the matter therein borrowed from authorities open to all the world, in order to save his labour and expense of consulting the original work (2). But as it appeared to the satisfaction of the Court that B., the defendant, had taken the phraseology and arrangement of many questions and answers from the plaintiff's book, although the defendant swore that he had not done so, this rendered it impossible for the Court to obtain from the defendant (as in *Mawman v. Tegg* (3)), any information as to the *quantum*; and the Court, therefore, having been satisfied that in certain chapters of the defendant's work this improper use had been made of the plaintiff's book, restrained the publication of such chapters only, but not of the entire work; the plaintiff to bring an action forthwith, and the defendant to keep an account in the meantime (4). And, notwithstanding *Bell v. Whitehead* (5), if the Court is led to the conclusion that there has been piracy, it will not grudge any labour that may be requisite in order to ascertain how far the injunction should extend (6).

3. By the effect of sect. 18 of the 5 & 6 Vict. c. 45, "An Act to amend the Law of Copyright," the proprietor of a periodical is precluded from republishing without the consent of the author articles written by the latter for, and published in, such periodical, in any other form than as reprints of the entire numbers of the periodical in which those articles appeared; and a republication in supple-

(1) *Jarrold v. Houlston*, 3 K. & J. 708; 3 Jur. (N. S.) 1051.

(2) *Ib.*

(3) 2 Russ. 385.

(4) *Ib.*

(5) 3 Jur. 68.

(6) *Ib.*

mental numbers of a selection of various tales previously published in a periodical is a separate publication within the section. So held in a case where an author had contributed tales which were, under the said Act and section, published in portions or parts in numbers of the 'London Journal,' and an injunction was granted by Vice-Chancellor Sir J. Stuart on his behalf, restraining the proprietors of that periodical from re-publishing the same tales in portions or parts of supplementary numbers of the 'London Journal,' not being reprints of that publication (1).

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reprints of
entire
numbers.

4. It is no infringement of copyright to represent a play dramatised from a novel written by another author; but it is an infringement to print and publish a play so constructed, and, an account being waived, a perpetual injunction was granted against the printing and publishing of such plays, without any preliminary inquiry as to damages (2). This was a bill filed by the publishers and owners of the copyright in two novels called 'Aurora Floyd' and 'Lady Audley's Secret,' written by Miss Braddon. The novels had been dramatised by Mr. Suter, and performed at the Queen's Theatre, and the defendant, Mr. Lacy, had published the two plays as they were performed; the Vice-Chancellor said, that the question of the extent of appropriation which is necessary to establish an infringement of copyright is often one of extreme difficulty, but that in cases of this description the quality of the piracy is more important than the proportion which the borrowed passages might bear to the whole work; but that here it was enough to say that the defendant admitted that one-fourth of the dramas was composed of matter taken from the novels.

Representing
a play drama-
tised from a
novel is not
an infringe-
ment of copy-
right.
But publish-
ing a play so
constructed is
an infringe-
ment.

5. If a plaintiff shews that his copyright has been infringed, the Court will grant an injunction without proof of actual damage (3).

6. Where A. published a play, and afterwards published a novel founded upon it, into which he introduced many scenes and passages from the play, and B. afterwards published a play compiled from A.'s novel, without (as was alleged) any knowledge of A.'s play; and B.'s play contained scenes and passages substantially identical with scenes and passages which were common

The publica-
tion of a play
founded on a
novel, con-
taining scenes
and passages
common to the
novel, and a
prior play
upon which

(1) *Smith v. Johnson*, 33 L. J. (Ch.) 137; 9 Jur. (N. S.) 1223. (2) *Tinsley v. Lacy*, 1 H. & M. 747; 32 L. J. (Ch.) 535.

(3) *Smith v. Johnson*, 33 L. J. (Ch.) 137; 9 Jur. (N. S.) 1223.

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the novel was founded, is an infringement of the copyright in the prior play.

both to A.'s play and novel; Vice-Chancellor Sir W. P. Wood held, upon a motion for an injunction to restrain the defendant from publishing a drama called 'Never too Late to Mend,' that even if B.'s play were a fair adaptation of the novel, and not an infringement of the copyright therein, it was an infringement of the copyright in A.'s play (1). In this case the plaintiff was author of a drama called 'Gold,' which had been acted in 1853, and published by the defendant with the plaintiff's permission. The plaintiff had subsequently, in 1856, published a novel, called 'Never too Late to Mend,' founded upon his play of 'Gold,' and had introduced into it many passages of dialogue taken almost verbatim from the play. In 1861 the defendant published a drama called 'Never too Late to Mend,' compiled by Mr. Hazlewood, and described as founded on the plaintiff's novel. This drama had the plot common to the plaintiff's play of 'Gold' and the novel, and contained several of the passages of dialogue which were found both in 'Gold' and in the novel.

An alien friend first publishing his work whilst residing in this country, or in any possession of the British Crown, is entitled to copyright.

7. Where the copyright of a work of an alien had been sold to a British subject, who published it in this country in 1844, and the copyright was infringed in 1849, but the state of the law then rendered it very doubtful whether the copyright was protected, and the purchaser merely protested against the infringement, but in 1851, within a reasonable time after the decision of a case in the Exchequer Chamber had established, as was then supposed, the general question of copyright in an alien, he filed his bill, and moved to restrain the publication of the pirated work, the Court held that there had been no such delay as to disentitle him to an injunction (2). In this case an alien, resident abroad, composed three musical pieces in a foreign country, and sold the copyright in this country to the plaintiff, a British subject, who published the work in London. The work was on the same day published in Prussia. On motion in a suit instituted by the purchaser of the copyright against a person who had, without leave, published the three musical compositions in this country, the Court held that the publication was within the Copyright Act, 5 & 6 Vict. c. 45, and granted an injunction restraining the unauthorized publication (3).

(1) *Reade v. Lacy*, 1 J. & H. 524.

(2) *Buxton v. James*, 5 De G. & Sm. 80; 16 Jur. 15.

(3) *Ib.*

And in *Ollendorf v. Black* (1) it was held that an alien resident abroad might himself have copyright in a work written by himself, and published for the first time in this country, at all events if he was resident here at the time of publication. In this case an alien author had first published a literary work while resident in this country, and an edition of the same work was published in Frankfort-on-the-Maine, and copies were imported into this country and sold by a London bookseller, and the alien filed a bill for an injunction to restrain the sale, and on motion the same was granted, the plaintiff undertaking to bring an action if the defendants desired it. And in *Chappell v. Purday* (2) the Court said there, also, that it appeared to itself that a foreigner who was the author of a work unpublished in France might communicate his right to a British subject, at least for the period prescribed by the statute of Anne, that is to say, fourteen years. But in *Jefferys v. Boosey* (3) the House of Lords held that an author resident abroad cannot, by assigning a published work according to the law of his own country, give the assignee a title which will be recognised in this country. But in *Low v. Routledge* (4), and *Routledge v. Low* (5), it was held that the word "author" is used in the 5 & 6 Vict. c. 45, without limitation or restriction, and is therefore equally applicable to foreigners as to British subjects, and that under the 5 & 6 Vict. c. 45, the first publication of a book must, to secure British copyright to its author, be made in the United Kingdom, and British copyright, when once it exists, extends, under s. 29, over every part of the British dominions. The protection of the statute is given to every author who first publishes in the United Kingdom, where-soever he may then be resident, or of whatever state he may be the subject (*per* Lord Cairns (Chancellor) and Lord Westbury, *dub.* Lords Cranworth and Chelmsford) (6). And an alien friend first publishing an original work, of which he is the author, in England, is entitled to copyright in such work under the 5 & 6 Vict. c. 45, that is to say, to the exclusive right of multiplying copies throughout the British dominions, provided that at the time of such

A foreigner resident abroad cannot give his assignee a title.

(1) 4 De G. & Sm. 209; 14 Jur. 114; 10 Jur. (N.S.) 922; 11 Jur. (N.S.) 1088; 20 L. J. (Ch.) 165. 939; 14 W. R. 90; 33 L. J. (Ch.) 717.

(2) 4 Y. & C. 435.

(5) L. R. 3 H. L. 100; 37 L. J. (Ch.)

(3) 4 H. L. C. 815.

454; 16 W. R. 1081; 18 L. T. (N. S.)

(4) L. R. 1 Ch. 42; 35 L. J. (Ch.) 874.

(6) *Ib.*

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An alien author of a serial tale first publishing abroad, has copyright of last chapters published in England, if residing at the time in British territory.

The word "author" in 5 & 6 Vict. c. 45, includes alien authors.

publication he is residing, however temporarily, in any part of the British dominions; and this is so although the temporary residence is in a British colony (as Canada) with an independent legislature, under the laws of which he would not be entitled to copyright (1).

And an alien author of a serial tale, in course of publication in a foreign periodical magazine, by residing in British territory at the date of publication in England of the last few chapters of the tale, which were first published here, acquires all the rights of a British subject in respect of the copyright of such chapters (2). And an alien friend coming into one of the British colonies, and residing there during and at the time of the publication in this country of a work composed by the alien, and first published in the United Kingdom, is entitled to copyright in this country in the work so published. An alien coming into a British colony becomes temporarily a subject of the Crown, and he thus acquires rights both within and beyond the colony, and the latter cannot be affected by the laws of the colony into which he comes; and an alien friend is entitled to British copyright in a work composed by him and first published in England during the time of his residence in any part of the British dominions, and the word "author" in the 5 & 6 Vict. c. 45, includes alien authors (3). But though now settled, the decisions on this point have been very conflicting, as in *Delondre v. Shaw* (4), where it was held that the Court would not protect a foreigner's copyright, while in *Bentley v. Foster* (5) it was held that an alien *ami* was entitled to the protection of the law as to works originally published in this country, although himself were residing out of it. And in *D'Almaine v. Boosey* (6), it was held that the English assignee of the copyright of a foreign musical composer was within the protection of the statutes relating to copyright, and it was there also said, *semble*, that a foreigner who resides and publishes in England was within

(1) *Routledge v. Low*, L R. 3 H. L. 100; 37 L. J. (Ch.) 454; 16 W. R. 1081; 18 L. T. (N. S.) 874.

(2) *Low v. Ward*, 37 L. J. (Ch.) 841; L. R. 6 Eq. 415; 16 W. R. 1114.

(3) *Low v. Routledge*, *Routledge v. Low*, *supra*.

(4) 2 Sim. 237.

(5) 10 Sim. 329.

(6) 1 Y. & C. Ex. Eq. 288; 4 L. J. (N. S.) 21. And see other conflicting cases, as *Chappell v. Purday*, 14 M. & W. 303; *Boosey v. Davidson*, 18 L. J. (N. S.) (Q. B.) 174; *Cocks v. Purday*, 5 C. B. 860; *Boosey v. Purday*, 4 Ex. 145.

the like protection. But where a book is published in a foreign country, copies of which are bought and then published in this country, persons who purchase a part of such work and publish it here, have no copyright therein (1).

Where publication is first in foreign country, then in this, there is no copyright in the purchaser of the work.

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8. The 19th section of the International Copyright Act, the 7 & 8 Vict. c. 12, (which enacts that no author of any book or dramatic piece first publishing out of the dominions shall have any copyright therein, or exclusive right to representation thereof, otherwise than such (if any) as he may become entitled to under the Act) applies to British subjects first publishing in a country with which no international convention exists. Therefore where a British subject first produced for representation a dramatic piece or entertainment, of which he was the author, at New York, in America, and he subsequently produced it in London, Vice-Chancellor Sir W. P. Wood held that as he had not complied with the provisions of the 7 & 8 Vict. c. 12, and there being no international treaty or arrangement (which was alluded to by 7 & 8 Vict. c. 12, s. 14), he had not obtained the copyright to such piece in England (2), nor the exclusive right to the representation of his drama, though he could not, by any possibility, have complied with the provisions of the said Act, no regulation having been made according to the course pointed out in the Act as to international copyright between the two countries (3). This was a bill filed by the author of a dramatic piece (the 'Colleen Bawn') to restrain an infringement of his right of representation by the defendant who had represented a piece as to which the Vice-Chancellor said that, upon the evidence, he had no doubt that the representations given by the defendants were a distinct piracy on the plaintiff's composition.

The International Copyright Act (7 & 8 Vict. c. 12) s. 19, applies to British subjects publishing in a country with which no international convention exists. And a British subject first producing a drama at New York, but not having complied with the Act, and being no treaty, has no copyright in England—and that although he could not have complied, no regulations having been made according to the Act.

9. The International Copyright Acts, 7 & 8 Vict. c. 12, 15 & 16 Vict. c. 12, and the convention with France and Order in Council made thereunder, do not exempt authors of works in France claiming copyright in this country from the conditions affecting

Convention with France, and Order in Council, do not exempt authors in France from conditions affecting authors in England.

(1) *Guichard v. Mori*, 9 L. J. (Ch.) M. 597.
227.

(3) *Boucicault v. Delafield*, 9 Jur.

(2) *Boucicault v. Delafield*, 1 H. & (N. S.) 1282; 33 L. J. (Ch.) 38.

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A French weekly newspaper must be registered within three months after commencement, or, if commenced before 1852, within three months after Order in Council.

Neglect of officials to register, prevents author having benefit of statute.

If the date of first publication, or name of publisher, is incorrectly entered in registering proprietorship of copyright, subsequent assignment by entry in registry is invalid.

Plaintiff is entitled to a discovery in a suit to restrain piracy of a literary work, notwithstanding submission to injunction.

No injunction against selling unsold stock of copies; but a question

authors of works in this country (1). And where the Order in Council of the 10th January, 1852, provided that French works must be registered at Stationers' Hall within three months after the first publication thereof in France, "or if such work be published in parts, then within three months after the publication of the last part thereof;" Vice-Chancellor Sir W. P. Wood held that a French newspaper published weekly, and not intended to be completed in any definite number of parts, must be registered within three months after the commencement, or if it had commenced before 1852, within three months after the date of the Order in Council; and *semble*, the registration of a number of such a periodical in 1855, long after its commencement, did not extend to the succeeding numbers the protection of the International Copyright Acts (2).

10. Neglect to register on the part of the officials at Stationers' Hall prevents the author having the benefit of the statute as against the public (3).

11. Where in registering the proprietorship of a copyright pursuant to the 5 & 6 Vict. c. 45, either the date of the first publication, or the name of the publisher, is incorrectly entered; a subsequent assignment by entry in the book of registry is invalid; and where the assignees, by entry of a copyright of a work called 'Haunted Hearts,' the proprietorship of which was thus incorrectly entered, filed a bill to restrain an infringement of the copyright, a demurrer thereto was allowed by Vice-Chancellor Sir R. T. Kindersley, on the ground that the assignees had no title (4).

12. In a suit to restrain a piracy of a literary work, the plaintiff is entitled to a discovery, notwithstanding the defendant offers to submit to an injunction, and to pay the costs, and a motion by the defendant to stay proceedings after interrogatories had been filed, and before the defendants had answered, was refused (5).

13. In *Howitt v. Hall* (6), where an author had contracted with a printer and publisher for the "copyright and sole right of sale for four years, from 15th March, 1854," of a book, written by the

(1) *Cassell v. Stiff*, 2 K. & J. 279.

(2) *Ib.*

(3) *Ib.*

(4) *Low v. Routledge*, 10 Jur. (N.S.)

922; 33 L. J. (Ch.) 717.

(5) *Stevens v. Brett*, 10 L. T. (N.S.)

231.

(6) 10 W. R. 381.

author, and the publisher had printed three editions of the work previously to the expiration of the four years in March, 1858, but had printed none since; Vice-Chancellor Sir W. P. Wood held, that an injunction would not lie to restrain the publisher from selling an unsold stock of copies of the work. The Vice-Chancellor said, that the purchase of the copyright carried with it the right of printing and publishing, and that the defendant was entitled to continue selling after the expiration of the four years' term, the stock printed by him under his purchase. That the Copyright Acts were directed against unlawful printing (8 Anne, c. 19, and 5 & 6 Vict. c. 45. s. 15); and that when, as in this case, the defendant had acquired the right of lawfully printing the work, he was at liberty to sell, at any time, what he had so printed. That it had been suggested that the effect might be to destroy the copyright in the author altogether, as the publisher who had purchased the copyright for a limited period only, might during that period print off copies enough to last for all time, and the Vice-Chancellor said that a nice question might indeed arise as to the number of copies of which an edition might consist.

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may arise as
to the proper
number of
copies of an
edition.

14. The Court will hesitate to commit a defendant alleged to have committed a breach of an interim injunction, when it sees that he has endeavoured to set himself right in respect to the original charge against him of infringing the plaintiff's copyright (1).

15. If a *prima facie* title to the copyright in a book be rebutted, the right may be supported without the production of a formal assignment attested by two witnesses; and Lord Wensleydale said that he thought that the opinion of the six judges in the case of *Jefferys v. Boosey* (2) was correct, that since the statute of the 54 Geo. 3, c. 156, there was no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses, and that he thought that the receipt in writing produced in this case (*i.e.* a receipt for the purchase-money by the author to the purchaser upon the sale of the work) would operate as an effectual assignment (3); and by the 13th section of the 5 & 6 Vict. c. 45, a registered proprietor may assign his interest, or any portion thereof, by making an entry in the book of registry of such assignment, &c.

Copyright can
be assigned by
a receipt in
writing and
no formal
assignment is
necessary,
semble.

(1) *Cornish v. Upton*, 4 L. T. (N. S.) 862.

(2) 4 H. L. C. 815.

(3) *Kyle v. Jeffreys*, 3 Macq. H. L. Cas. 611; *v.* 5 & 6 Vict. c. 45, s. 15.

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The name of the editor of a journal on the title-page is no part of the title.

Court refused here (remuneration of editor depending on success of journal) to restrain proprietors altering articles, or inserting others, a jury must determine the damage (if any) in such a case.

A fraudulent intention in infringing copyright not necessary to entitle to relief.

A publisher with notice of a covenant not to publish &c., will be restrained breaking it. And *semble*, partner of covenantor restrained.

16. The name of the editor appearing upon the title-page forms no part of the title; and the Master of the Rolls refused to restrain by injunction the proprietors of a journal from omitting the publication of the editor's name on the title-page, although the agreement between the proprietors and editor provided that the title of the journal should not be altered without mutual consent (1).

17. Without determining the extent to which the owners of the copyright in a journal are justified in interfering with the editor in his editorial capacity, where the remuneration of the editor depends upon the success of the journal, the Court refused to restrain the proprietors from altering articles proposed to be inserted by the editor, or inserting others contrary to his wish, it being the province of a jury to determine the amount of damage, if any, which the editor sustained by reason of the conduct of the proprietors (2).

18. A fraudulent intention in infringing copyright is not necessary to entitle the proprietor of the copyright to relief, if his right of property has been invaded; and where the registered proprietors of *Bell's Life in London and Sporting Chronicle*, published weekly, at the price of 5*d.*, filed a bill against the proprietors and publishers of a new newspaper called the *Penny Bell's Life and Sporting News*, which was published at the price of 1*d.*, and the evidence produced shewed, that from the similarity of the two names mistakes had occurred, and were likely to occur, on the part of the public, and that inquiries had been made at the office of *Bell's Life in London* for the *Penny Bell's Life*; on a motion on behalf of the plaintiffs, Vice-Chancellor Sir J. Stuart granted an injunction to restrain the defendants from the use of the words *Bell's Life* in the title of their newspaper (3).

19. Where an author has sold the copyright of a work published under his own name, and covenanted with the purchaser not to publish any other work to prejudice its sale, another publisher who has notice of this covenant will be restrained from publishing a work subsequently purchased by him from the same author, and published under his name, on the same subject, but under a dif-

(1) *Crookes v. Petter*, 6 Jur. (N. S.) 1131.

(2) *Ib.*

(3) *Clement v. Maddick*, 1 Giff. 98; 5 Jur. (N. S.) 592.

ferent title, and though there be no piracy of the first work (1); and *semble*, if a covenantor and his partner publish a rival work on the same subject, the partner will be restrained as well as the covenantor. But if a covenantor, having entered into such a covenant with B., sell the materials of a rival work to C., who concludes his agreement and pays his money without any notice of the covenant, *semble* an injunction on the ground of that covenant cannot be maintained against C. (2).

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SECT. 2.

But *semble*,
purchaser of
rival work
without notice
of covenant,
not bound.

20. Where in 1857, the defendant, being proprietor of a weekly publication, the 'London Journal,' the price of which was 1*d.*, assigned his copyright and interest therein to the Plaintiff for value, and entered into a covenant with him not to publish either alone or in partnership with any other person any weekly periodical of a nature similar to the 'London Journal;' and in 1859 the defendant issued an advertisement announcing the publication by him of a daily newspaper to be called the *Daily London Journal*, to be sold at 1*d.*, and the plaintiff thereupon filed a bill against the defendant for an injunction to restrain him from publishing the *Daily London Journal*; Vice-Chancellor Sir W. P. Wood made an order for an injunction, which, upon appeal, was affirmed by Knight Bruce, L.J. (*dissentiente* Turner, L.J.), upon the plaintiff undertaking to abide by any order the Court might make as to damages, and to bring an action against the defendant within one week (3).

21. The registered owner of a copyright in a work is, under the 23rd section of the 5 & 6 Vict. c. 45, entitled to have all the unsold copies of a piratical edition delivered up to him for his own use, without making any compensation for the cost of production or publication. But as to the copies of such piratical edition which may have been sold, he is not entitled in Equity to the gross produce of the sale thereof, but only to the profits which the party may have made by the sale thereof; but to recover the pirated copies he must proceed at Law (4).

Registered
owner of copy-
right is en-
titled to un-
sold copies of
pirated
edition, and
to the profits
on copies sold.

22. Where the plaintiffs, music publishers, having adapted

(1) *Barfield v. Nicholson*, 2 S. & S. 1; 2 L. J. (Ch.) 90; S. C. *sub. nom.*

Barfield v. Kelly, 4 Russ. 356.

(2) *Ib.*

(3) *Ingram v. Stiff*, 5 Jur. (N. S.) 947; 33 L. T. (N. S.) 195.

(4) *Delf v. Delamotte*, 3 K. & J. 581; 3 Jur. (N. S.) 933.

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original words to an old American air known there as 'Lilly Dale,' which was re-arranged for them with a new accompaniment and symphony, and gave to the song so composed the name of 'Minnie,' and having procured it to be sung by Madame Anna Thillon, a popular singer, at M. Jullien's concerts in London, and when it had by that means become a favourite song, published it with a title-page containing an original portrait of the singer who had brought the song into notice, and the words, "Minnie, sung by Madame Anna Thillon and Miss Dolby at Jullien's concerts, written by George Linley;" Vice-Chancellor Sir W. P. Wood held, that the publishers had by these means obtained a right of property in that name and description of their song which a Court of Equity would restrain any person from infringing. And another music publisher having subsequently published the same melody with different words, but a new accompaniment and symphony, and entirely new arrangement of the music, and upon the title-page having placed a similar but reduced portrait of Madame Anna Thillon, copied from the likeness on the plaintiff's edition, with the words, "Minnie Dale, sung at Jullien's concerts (and always encored) by Madame Anna Thillon, the music composed by H. S. Thompson," &c., this song having never in truth been sung by Madame Anna Thillon at Jullien's concerts; the Vice-Chancellor held, that this was a piracy resembling the use of another's trade mark, and a palpable attempt to induce the public to believe that the song so published was the same as that of the first publishers, and at their suit an injunction was granted on interlocutory application to restrain this or any other similar infringement of their right to the name and description of their song (1); and *semble*, that such a suit should be instituted without delay after discovering the infringement (2); and the Vice-Chancellor also held that the statement in the title-page, "written by L.," when the music was not, although the words were, composed by L., was not such a misrepresentation as to disentitle the plaintiffs to protection (3). And in *Chappell v. Davidson* (4), being another suit to restrain the publication and sale of another imitation of the same song, the same Vice-Chancellor held that the entry at Stationers' Hall of the music

(1) *Chappell v. Sheard*, 2 K. & J. 117; 1 Jur. (N. S.) 996.

(2) *Ib.*

(3) *Ib.*

(4) 2 K. & J. 123.

as well as the words of the song, although the plaintiffs might have entered only those parts of the publication to which they had an exclusive right, did not deprive the plaintiffs of their right to the injunction; nor could the defendant escape his liability by cautioning his shopmen to explain to purchasers that his song was not the same as the plaintiffs', because he could not secure that retail dealers purchasing from him would give the same information to their customers (1); and the Court, having granted an interim injunction, and the defendant, instead of submitting, having insisted on his right to continue the publication of his song, held, that the defendant must pay the costs of a motion against him to continue the injunction, although it appeared that no application had been made to him by the plaintiffs previously to the filing of the bill; but another part of the case being that the defendant had printed two bars of music which had been added by the plaintiffs to the original air, the Court refused to extend the injunction to restrain such piracy until the fact had been established by a trial at Law. The affidavit of one of the plaintiffs, shewing that the imitation had recently come to his knowledge, was worded in such a manner as not to be free from ambiguity, but the defendants had not, on their side, proved express notice to the plaintiffs of their publication; the Vice-Chancellor held, that the *onus* being on the defendants to shew laches, the motion might stand over for the plaintiffs to put in additional affidavits (2).

23. There are four *indicia* in the title of a song the imitation of which by another party may be restrained by injunction, viz., the name of the song, the name of the singer, of the composer, and of the publisher (3). The four *indicia* in the title of a song the imitation of which may be restrained.

24. There cannot be copyright claimed for part of a book and disclaimed for another part, as in a patent; and the Court, in this case, held that the plaintiffs were entitled to protection, although they had simply registered their song without mentioning that they claimed no copyright in the tune (4). There cannot be copyright claimed for part of a book and disclaimed for another part.

25. When the Court is satisfied that a piratical imitation has been made by the defendant, the plaintiff will not be put to the terms of bringing an action to try his title at Law, although the When Court satisfied piratical imitation made, plaintiff is not put

(1) *Chappell v. Davidson*, 2 K. & J. 123.(2) *Ib.*(3) *Ib.*(4) *Ib.*

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upon terms of
bringing an
action to try
his title.

The agree-
ment for the
publication of
a work (here)
of a personal
nature, and
not assignable
by either
without con-
sent of other
party.

defendant cannot take any steps to bring the fact to an issue before the jury (1).

26. Where a plaintiff, claiming a copyright in a work of a foreigner, obtained an injunction on giving an undertaking to abide by any order the Court might make respecting damages, and the law was, pending the suit, finally settled against the existence of such a copyright, the Lords Justices held that the defendant was entitled to have the damages sustained by him ascertained as correctly as practicable and paid, and that a mere dismissal of a bill with costs was not a sufficiently accurate assessment and award of damages (2).

27. Where by memorandum of agreement executed by the author of a legal treatise and certain publishers it was stipulated that the author should prepare the work for publication, correct the proof sheets, and superintend the publication thereof, and that the publishers should direct the mode of printing the work and pay all the charges thereof, and of publishing the same, and take all the risk of publication on themselves, and that the produce of the sale of the work, after deducting the expenses, should be divided equally between the author and publishers; that the accounts of the copies sold should be taken annually, and upon the principle therein mentioned; and that the author should make all necessary alterations and additions for a second or any subsequent edition of the work that might be required; and that the publishers should print and publish every such subsequent edition on the before-mentioned conditions; and, lastly, that the publishers should be at full liberty to dispose of the copies of any edition of the work that should not be sold off within five years after publication, either by public auction or private sale, or in such manner as they might deem most advisable, so that the account might be finally settled; and after a second edition of the work had been printed and published, pursuant to the terms of the agreement, all the interest of the publishers under the agreement, including 400 unsold copies of the second edition, became vested, with the author's concurrence, in the plaintiffs; and a third edition having been subsequently prepared by the author for the defendant, W. G. B., and by him published;

(1) *Chappell v. Davidson*, 2 K. & J. 123.

(2) *Novello v. James*, 5 De G. M. & G. 876.

the Court, affirming the decision of Vice-Chancellor Sir W. P. Wood, refused with costs a motion by the plaintiffs to restrain such publication, the agreement being held to be of a personal nature on both sides, and the benefit of it not assignable by either party without the other's consent (1).

28. Where the first edition of a work of compilation was published before the 5 & 6 Vict. c. 45, and several editions of it were published after this Act, and not registered, Vice-Chancellor Sir R. T. Kindersley held, that as to so much of the matter contained in the original edition as was contained in the subsequent ones, the owner might sue, although those subsequent editions were not registered; but as to the new matter the subsequent editions were books which ought to be registered under that Act, s. 24, and the owner could not sue for infringement on that point (2).

As to the new matter—editions of works of compilation published since 5 & 6 Vict. c. 45, are books which must be registered, but the old matter may be sued upon, although the subsequent editions are not registered.

29. If a foreigner were to translate an English work, and then an Englishman to re-translate that foreign work into English, that would be an infringement of the original copyright, even if the re-translator did not know that the foreign translation was taken from the English work (3).

A retranslation of a work translated into a foreign language, is an infringement of the original copyright.

30. Where the plaintiff was the publisher of a book containing designs of groups, taken from the Exhibition of 1851, of stuffed animals, and had annexed to each plate names descriptive of the designs, those designs being illustrations of the letterpress, and the defendants subsequently published a similar work, with stories containing the same *dramatis personæ*, but the stories were different; and it appeared upon an inspection, and from the evidence, that the defendants had copied their designs, as well as the names affixed to them, from the designs and names of the plaintiff; and the plaintiff's work had been registered pursuant to, 5 & 6 Vict. c. 45, but the plates contained therein had not "the day of first publishing thereof, with the name of the proprietor, engraved thereon," in conformity with the provisions of 8 Geo. 2, c. 13, s. 1; and the question was, whether these plates, which if printed separately would not have been protected by reason of the provisions of the latter statute not having been complied with, were

Copyright extends to designs—part of a book—as well as to the letterpress, and though the plates do not conform with 8 Geo. 2, c. 13, s. 1.

(1) *Stevens v. Benning*, 6 De G. M. & G. 223; 1 Jur. (N. S.) 74.

(2) *Murray v. Bogue*, 1 Draw. 353.

(3) *Ib.*

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not protected as forming part of a work protected under 5 & 6 Vict. c. 45; the Court held, that as the prints or designs formed part of a book, although such book contained letterpress also, yet, the prints or designs being an illustration of the letterpress, the statute 5 & 6 Vict. c. 45 vested in the registered proprietor of such book a right to restrain any imitation or infringement of his copyright; when there are designs which form part of a book in which copyright exists, such copyright extends to the designs as well as to the letterpress (1).

Actual payment for an article for a periodical, is a condition precedent to vesting copyright.

31. Under the Act to amend the law of copyright, 5 & 6 Vict. c. 45, actual payment for an article written for a periodical work is a condition precedent to the vesting of the copyright in the article in the proprietor of the work; a contract for payment is not sufficient (2).

Several can have a joint interest and copyright in a book by one of them.

32. Where the bill stated that one of the plaintiffs had composed a book, and that all the plaintiffs had caused the book to be printed and published for their joint benefit, and that the book had been registered by the plaintiffs, as proprietors of the copyright thereof, and that the copyright had ever since remained in the plaintiffs, for their joint benefit; and that the defendants had published a book in which numerous passages were copied from the plaintiffs' book; the Court held, upon a motion for the injunction, that under the Copyright Act, 5 & 6 Vict. c. 45, the plaintiffs had a joint right to sue; and upon comparison of the two books, that in the defendant's book there had been such copying from the plaintiffs' book as entitled them to an injunction (3).

33. In *Osborne v. Donaldson* (4) the Court dissolved an injunction obtained by the assignee of an author, after the expiration of the two terms of years allowed by the statute of Anne; the common law right of the author being so extremely doubtful.

34. In cases of contested copyright, the Court is disposed rather to restrict than increase the number of cases in which it interferes by injunction before the establishment of the legal title, and it will give great weight to the consideration of the questions, which

(1) *Bogue v. Houlston*, 5 De G. & Sm. 267.

(2) *Richardson v. Gilbert*, 1 Sim. (N. S.) 336.

(3) *Stevens v. Wildy*, 19 L. J. (N. S.) (Ch.) 190.

(4) 2 Eden, 327.

side is more likely to suffer by an erroneous or hasty judgment, and the prejudicial effect the injunction may have on the trial of the action (1).

35. The defendant was a vendor of a literary work published in weekly numbers, in one of the numbers of which was contained the commencement of a work of fiction, which, with the exception of a few colourable alterations, was in all respects similar to a prior work of which the plaintiff was the author and publisher; on a bill by the plaintiff, praying that the defendant might be restrained from publishing, selling, or otherwise disposing of the number containing the commencement of such work of fiction, or any continuation or other part thereof, and from copying or imitating, in the whole or in part, the plaintiff's book; the Court granted an injunction as prayed, except as to the words "or imitating," but directed the plaintiff to bring an action within ten days against the defendant for the invasion of his alleged copyright (2).

36. The Court has jurisdiction to direct admissions in an action brought by the direction of the Court (3).

37. In a suit to restrain the piracy of a literary work, a plaintiff who, in opposition to the defendant's denial of his title, obtained an injunction, is entitled to an answer from the defendant for the purpose of having his title admitted (in case, by arrangement between the parties, the title is not established at Law), and also for the purpose of having an account from the defendant of the profits made by the sale of the spurious work. The plaintiff therefore, under such circumstances, is entitled to the costs of the suit, including the answer; and if, by the refusal of the defendant to pay those costs, the plaintiff is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit as between party and party, although, at the hearing, he may waive the account; and the plaintiff's equity in this respect will not be affected by his having offered to waive his right to an answer with a view to obtain terms more beneficial to himself than the Court would, under any circumstances, accord to him, as, for instance, with a view to receive costs as between solicitor and client (4).

(1) *M'Neill v. Williams*, 11 Jur. 344.

(4) *Kelly v Hooper*, 1 Y. & C. Ch.

(2) *Dickens v. Lee*, 8 Jur. 183.

197.

(3) *Ib.*

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Sale of a sheet
almanac
pirated from a
directory,
restrained.

38. The Court granted and continued an injunction against the defendant restraining the sale of a sheet almanac containing matter pirated from a distinct part of a directory published by the plaintiff affording information with respect to the post-office, compiled from public documents, the matter pirated forming an exceedingly small portion of the plaintiff's work, but bearing a great proportion to the other matter in the defendant's work (1).

39. Where it had been agreed between the author (Sir Edward Sugden) and the publisher (Mr. Sweet) of a new edition of a work (the 'Treatise on Vendors and Purchasers') that a certain number (2500) of copies should be printed, corresponding in type and page with another work of the author, at the sole cost of the publisher, the author be paid a certain sum by instalments, the first to be paid as soon as the edition was ready, and the price of the work be a certain sum; the Court held, that the publisher was to be deemed not merely a purchaser of such number of copies, but was in Equity an assignee of the copyright of it to the extent that he was to be the sole publisher of the work until that edition consisting of the said number was sold, and that consequently a bill by him to restrain a piracy of the work was not demurrable; and that to sustain the title to relief the plaintiff might rely on alleged pirated passages, although contained in a previous edition of the work, as well as in the new edition; and the Court granted an injunction on the plaintiff undertaking to try his right at Law; and the author declining to permit his name to be used in the action, the defendant was ordered to admit that the plaintiff was the legal proprietor of the edition of the work (2).

40. Where, in 1830, A., a foreigner resident in Paris, made a legal assignment of his copyright in an opera ('Fra Diavolo') to L., resident in England, and L. in the same year sold his interest to C., without executing any written memorandum, and C. died in 1834, and in 1836 C.'s executor obtained a legal assignment, and in the meantime copies of the full score had been imported into England, and sold in London by several tradesmen, and in 1841 P. published and sold the overture of the opera in London; the Court held, that C.'s executrix could not maintain an injunction

(1) *Kelly v. Hooper*, 4 Jur. 2.

(2) *Sweet v. Cater*, 11 Sim. 572; 5 Jur. 68.

against P. for piracy, on the ground that the question being whether a party who, before the copyright had been actually parted with to him (because at the time there was no conveyance), had permitted the books to be imported here and sold without interference, was afterwards to be at liberty to come forward and say that no party should do the like again, and that it was an important question, and the Court thought it sufficiently doubtful to prevent any interference by injunction until it was decided (1).

41. A Court of Equity, where justice requires it, will grant an injunction to restrain a piracy on the application of a person having only an equitable title (2). And in *Hodges v. Welsh* (3) it was held that this Court will interfere by injunction to protect the copyright of the assignee of the author (in this case a reporter of legal decisions), though it appears that at the time of the alleged piracy there was not an assignment in writing, and the assignee had merely an equitable title, and that some of the cases were *ex relatione*; and it will disregard a permission from the author to infringe the copyright given after he had parted with his equitable title for valuable consideration, and it had appeared upon the title-page of his work that it was printed for the equitable assignee of the copyright. And the Court will interfere to protect copyright from piracy at the suit of plaintiffs who appear to have a good equitable title, even though it should not be quite clear that their legal title is complete (4). In *Morris v. Kelly* (5) the Court granted an injunction to restrain the performance of a comedy, the copyright of which had been sold by the author, and had been afterwards assigned by writing to the plaintiffs, although it did not appear whether the original assignment was in writing.

42. Where the defendants had published a work containing an original essay (less than a tenth part of the work) on modern English poetry, biographical sketches of forty-three modern poets, and the rest consisted of extracts and selections from their poems, amongst which were six short poems and parts of longer poems without any notes or criticisms being mixed up with them, and the

Party with equitable title only, can restrain piracy.

The publication of short poems, and

(1) *Chappell v. Purday*, 4 Y. & C. 485 (see this case as to the right of a foreigner in copyright, pl. 7, *ante*).

(3) 2 Ir. Eq. Rep. 266.

(4) *Mawrnan v. Tegy*, 2 Russ. 385.

(5) 1 Jac. & W. 481.

(2) *Ib.*

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extracts of poems, alleged to illustrate an essay, restrained.

Not necessary to specify in bill, &c., the parts of work considered to be pirated.

The possession of a copy more than a year before filing bill, held laches.

Minuteness of matter extracted for criticism, has great weight with reference to the right to an injunction.

If acquiescence in dif-

selections constituted altogether the bulk of the defendants' work, but were alleged to have been introduced into it for the purpose of illustrating the essay; the Court held, that this was a violation of the copyright of one of the poets whose works had been so used, and restrained the publication of such parts of the work as consisted of the plaintiff's composition, as being an infringement of the plaintiff's copyright, without proof of damage (1).

43. Where a party seeks to restrain an infringement of his copyright it is not necessary for him to specify, either in his bill or affidavit, the parts of his work which he considers to have been pirated, although he does not claim copyright in all the passages which are the same in both works; a general allegation that the defendant's work contains pirated passages, and a verification by affidavit of those passages, are sufficient (2).

44. In *Lewis v. Chapman* (3) the Court refused an injunction to restrain the piracy of a publication to which the plaintiffs would have been otherwise entitled, on the ground of delay in making the application (the defendants' work was completed in six years and a half before the bill was filed, and for more than a year before the bill was filed a complete copy of the defendants' work was in the possession of the plaintiffs), and the Court said that it was its duty, in the circumstances of this case, to impute to the plaintiffs such a knowledge of the contents of the defendants' work as made it their duty to apply for an injunction, if at all, at a much earlier period (4).

45. The question of minuteness in value of the original matter extracted from a work for purposes of criticism will have great weight with the Court in influencing its decision on the application for an injunction (5).

46. The Court is adverse to the practice of its time being occupied by applications for injunctions to restrain infringements of copyright, in which it is difficult, if not impossible, to take an account of the loss complained of (6).

47. If the owner of a copyright has, for some time past, ac-

(1) *Campbell v. Scott*, 11 Sim. 31;
11 L. J. (N. S.) Ch. 166; 6 Jur. 186.

(2) *Sweet v. Maugham*, 11 Sim. 51;
9 L. J. (N. S.) Ch. 323; 4 Jur. 456,
479; *Hotten v. Arthur*, 1 H. & M. 603.

(3) 3 Beav. 133.

(4) *Ib.*

(5) *Bell v. Whitehead*, 8 L. J. (N. S.)
Ch. 141; 3 Jur. 68.

(6) *Ib.*

quiesced in different individuals transcribing cases from his works, the Court will not interpose in his favour by injunction against other parties who have subsequently transcribed the cases from the same work, until the owner of the copyright has established his legal right (1).

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ferent individuals transcribing cases,

Court will not restrain others doing so until legal right established.

48. It is not only the quantity, but the quality, of the matter extracted by a defendant from the work of which the plaintiff has the copyright that is to be considered in an application to the Court for its interposition by injunction (2); and the question whether one author has made a piratical use of another's work does not necessarily depend upon the quantity of that work which he has quoted or introduced into his own book (3).

Not only quantity, but quality of matter extracted, has to be considered on an application for an injunction.

49. Where some only of the parts of the work of the defendant alleged to be piratical, but forming a considerable portion of a publication, had been produced in evidence and shewn to be pirated, but they were such as to justify the presumption that the general character of the work was piratical; the Court granted an injunction to restrain the defendant "from printing, &c., any copy of the work containing any articles copied or taken, or colourably altered from" the work of the plaintiff, without waiting till all the parts pirated could be ascertained (4).

Injunction granted if some only of the parts of the alleged piratical work, but forming a considerable portion, are produced in evidence and proved pirated.

50. Where the matter which is the subject of the alleged piracy forms but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years, the Court will not grant an injunction, but will leave the plaintiff to seek his legal remedy (5).

If alleged piracies very inconsiderable, and merely calculations, and work published some years, no injunction.

51. A plaintiff who complains of a piracy of his work, has no remedy in Equity unless he establish a title to an injunction, and then the account will follow (6).

52. In *Lawrence v. Smith* (7) the Court refused an injunction to restrain the infringement of copyright in a work as to which it appeared doubtful whether it did not intend to impugn the doctrines

Injunction refused where doubtful whether there was not an inten-

(1) *Saunders v. Smith*, 3 My. & Cr. 711.

(5) *Baily v. Taylor*, 1 Russ. & My. 73; Taml. 295.

(2) *Ib.*

(6) *Ib.*

(3) *Bramwell v. Halcomb*, 3 My. & Cr. 737; explained, *Id.* 736.

(7) *Jac.* 471; *Murray v. Benbow*, *Ib.* 474, n.; *et v. Southey v. Sherwood*, 2 Mer. 435.

(4) *Lewis v. Fullarton*, 2 Beav. 6.

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tion to impugn
authority of
Scriptures.

No injunction
granted where
copyright in
music not
asserted fifteen
years.

Copyright in a
court calendar
as an indi-
vidual work,
protected ;
and so of an
East India
calendar.

A colourable
abridgment
of law reports
restrained.

No injunction
against a fair
abridgment.

There may be
copyright of a
work partly
compilations,
selections,
and original matter.

Copyright
may be in

of the Scriptures. And in *Walcot v. Walker* (1) Lord Chancellor Eldon said that it was not the business of the Court to decree an injunction on account of the profits of works of such a nature that the author could maintain no action at law, but which the policy of the law will not permit him to consider his property, and that if no action at law would lie, the Court ought not to give an account of the unhallowed profits of libellous publications.

53. The Court refused to protect by an injunction, until established at Law, the copyright in music not asserted against violations by several persons for fifteen years (2).

54. In *Longman v. Winchester* (3) the Court granted an injunction against pirating a court calendar, the individual work creating copyright, though the general subject, as in the case of a map or chart, is common. And in *Matthewson v. Stockdale* (4) it was held that though copyright could not subsist in an East India calendar as a general subject, any more than in a map, chart, series of chronology, &c., it might in the individual work ; and that when it can be traced that another work upon the same subject is not an original compilation, but a mere copy, with colourable variations, the original will be protected by injunction, which, in this instance was continued until the hearing without a trial at law.

55. In *Walcot v. Walker* (5) the Court refused an injunction against the infringement of copyright depending on the effect of an agreement till recovery in action.

56. In *Butterworth v. Robinson* (6) the Court granted an injunction against a colourable abridgment of the reports among other law reports till answer or further order, upon certificate of the bill filed. But though the Court will grant an injunction against a publication piratically taken from another, it will not against a fair abridgment (7).

57. A work partly of compilations and selections from works on the subject, and partly original matter, may be the subject of copyright (8).

58. Copyright may be either in respect of matter or arrange-

(1) 7 Ves. 1.

(2) *Platt v. Button*, 19 Ves. 447.

(3) 16 Ves. 269.

(4) 12 Ves. 270.

(5) 7 Ves. 1.

(6) 5 Ves. 709.

(7) *Bell v. Walker*, 1 Bro. C. C. 451.

(8) *Lewis v. Fullarton*, 2 Beav. 6.

ment, but no property can be acquired in an article copied from another work (1).

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59. Where the plaintiff had published a book of roads of Great Britain, comprising Patterson's book, to the copyright of which the plaintiff was not entitled, with improvements and additions obtained by actual survey and otherwise, the Court refused an injunction to restrain a publication of an edition of Patterson comprising the plaintiff's improvements and additions (2). The Lord Chancellor said, what right had the plaintiff to the original work? and that if he were to do strict justice he should order the defendants to take out of their book all they had taken from the plaintiff, and reciprocally the plaintiff to take out of his all he had taken from Patterson.

respect of
matter or
arrangement,
but not in a
copy.

60. The Court granted an injunction till the hearing to restrain the publications of Milton's poems with Dr. Newton's notes, notwithstanding a small addition of original commentary (3). The Court thought that Milton's works were *in medio*, but that the notes and other additions were not so, and, therefore, as to them restrained the publication, though it left the text open to anybody (4).

Publication of
Milton's
poems with
Newton's
notes re-
strained, not-
withstanding
small addition
of original
commentary.

Milton's works are *in medio*, but notes and other additions not so.

61. The Court refused an injunction to restrain an alleged infringement of copyright before trial at Law, where the conduct of the plaintiffs had been such as, in the opinion of the Court, was calculated to induce the defendants to believe that the course taken by them would not be objected to by the plaintiffs (5).

Injunction
before trial
refused—
plaintiffs' con-
duct having
been calcula-
ted to lead
defendants to
believe no

objection would be made by plaintiffs.

62. To publish in the form of quadrilles and waltzes the airs of an opera of which there exists an exclusive copyright, is an act of piracy (6).

Publication as
quadrilles, &c.,
airs of a copy-
right opera, is
piracy.

63. In *Colburn v. Simms* (7) it was held that the proprietor of a book whose copyright had been invaded by the printing of a similar work, and who was entitled to an injunction to restrain the printing and sale of the unlawful work, was not, under the 54 Geo. 3, c. 156, s. 4, entitled to an order for the delivery up of

(1) *Barfield v. Nicholson*, 2 S. & S. 711; 7 L. J. (N. S.) Ch. 227; 2 Jur. 1; 2 L. J. (Ch.) 90. 491, 536.

(2) *Cary v. Faden*, 5 Ves. 24.

(6) *D'Almaine v. Boosey*, 1 Y. & C.

(3) *Tonson v. Walker*, 3 Swan. 672.

288; 4 L. J. (N. S.) Eq. 21.

(4) *Carnan v. Bowles*, 1 Cox, 285.

(7) 2 Hare, 543; 12 L. J. (N. S.)

(5) *Saunders v. Smith*, 3 My. & Cr.

Ch. 388; 7 Jur. 1104.

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the illegal copies, if the book the copyright of which had been infringed was not composed and entered according to the statutes at the time the illegal copies were printed ; and, *semble*, there is no common law right in the author or proprietor of a book which is pirated to the delivery up of the copies of the illegal work ; and therefore, if such relief is given in Equity, it must be under the provisions of the statute for the protection of literary property ; and, *quære*, whether the copies of the illegal work would in any case be ordered to be delivered up in a suit to which the person at whose expense and on whose account they had been printed was not a party, the Vice-Chancellor Sir J. Wigram said that that would be an anomaly. The 23rd section of 5 & 6 Vict. c. 45, which gives the registered proprietor of copyright in literary matter the right to have all the unsold copies of a pirated book delivered up, does not give him any right in this Court to more than the usual account of the net profits of all copies of the book. He has no right in this Court to an account of the gross proceeds, and to recover the pirated copies he must proceed at Law (1). But under the above section it is enacted that the unsold copies may be sued for and recovered by the registered proprietor of the copyright, or damages for the detention (2). In a case within the Copyright of Designs Act, 5 & 6 Vict. c. 100, Lord Justice Knight Bruce made an order for the delivery up to the plaintiff, for the purpose of being destroyed, of the drawings and cards used by the defendant in applying the plaintiff's design, and also the articles manufactured by the defendants to which the plaintiff's design had been applied (3).

64. In *Colburn v. Simms* (4) Vice-Chancellor Sir J. Wigram states the principles upon which the Court gives an account of the profits of the unlawful work in the case of piracy ; he says there, that it is true the Court does not by an account accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book ; that it is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the

(1) *Delfe v. Delamotte*, 8 K. & J. 581.

(3) *MacRae v. Holdsworth*, 2 De G.

(2) *Ib.* ; 5 & 6 Vict. c. 45, s. 23.

& Sm. 497.

(4) 2 Hare, 543 ; 12 L. J. (Ch.) 388 ; 7 Jur. 1104.

cheaper one ; that the Court, by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits he has made by his piracy and gives them to the party who has been wronged ; that in doing this the Court may often give the injured party more, in fact, than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold if the injury by the sale of the cheaper book had not been committed ; but that the Court of Equity, however, did not give anything beyond the account.

65. Penalties and forfeitures must, as a general rule, be waived by a party seeking equitable relief, and this applies to the Copyright Acts (1).

66. The person who forms the plan of the work to be composed by the labours of various persons, who employs different writers to contribute to it, and who pays them for their contributions, is the author and proprietor of such a work within the statute of Anne (2). The person forming plan of, and employing different persons to contribute to, a work, is author and proprietor thereof.

67. An injunction granted against a work which is published in successive numbers, on the ground of piracy in the published numbers, will not be modified so as to permit the publication of the future numbers while the question of piracy as to the others remains undetermined (3). An injunction against the numbers already published of a work will not be modified to admit publication of future numbers.

68. There is no copyright in specifications of patents (4). No copyright in specifications of patents.

69. Copyright exists in an individual work, but not in a general subject, though, from its nature, the consequence may be close resemblance and considerable interference, as in the case of maps and road-books (5) ; but there is no doubt that though a man may publish a book of roads, that may be the same as another man's (having a copyright), yet he cannot take that book and copy it (6). No copyright in a general subject, but the work must not be copied.

70. It was held by Lord Chancellor Eldon, in *Rundell v. Murray* (7), that an author who had given a work to a publisher, who, by the sale of it had reimbursed himself his expenses and made con-

(1) *Colburn v. Simms*, 2 Hare, 554 ;
Mason v. Murray, cited 3 Bro. C. C. 40.

(2) *Barfield v. Nicholson*, 2 S. & S.
1 ; 2 L. J. (Ch.) 90.

(3) *Ib.*

(4) *Wyatt v. Barnard*, 3 V. & B. 77.

(5) *Wilkins v. Aikin*, 17 Ves. 422.

(6) *Ib.*

(7) *Jac.* 311.

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Separate bills
must be filed
against each
bookseller
taking copies
of a spurious
edition.

junction, the Court made a reference to the Master to see if the two books were the same.

78. The proprietor of a copyright must file separate bills against each bookseller taking copies of a spurious edition for sale. The Lord Chancellor said the right against the different booksellers was not joint, but perfectly distinct, that there was no privity; and so of patent rights; but it would be otherwise of a right of fishery, or the custom of a mill; such bills prevent multiplicity of suits, and one general right being in the latter cases liable to invasion by all the world (1).

79. Where an author having sold to a bookseller a book of roads, which was printed in letter-press; after the expiration of the first fourteen years sold it to another, who published the high roads upon copper-plates, and the cross roads in letter-press; as to the last, an injunction was granted, at the suit of the original bookseller, against the latter, the author having, under the 8 Anne, c. 19, the then Copyright Act, no resulting right as against his own assignee (the original bookseller) after the first fourteen years, and this being part of the former work, although the delineation on copper-plates was a new work (2).

Fair abridg-
ment no in-
fringement—
it is a new
book—an
abstract in an
annual (here)
not piracy.

80. A fair abridgment of a work is no infringement of copyright (3); and an abridgment fairly made is a new book, because the invention, learning, and judgment of the author is shewn in it (4), and an abstract published in the 'Annual Register,' or magazine, was held not piracy, especially as the author himself had published extracts in a periodical paper (5).

Under 8 Anne,
c. 19, property
of book not
vested until
registration.

81. Lord Chancellor Hardwicke held that, under the 8 Anne, c. 19, the property of books could not vest without being first registered or entered with the Stationers' Company (6).

82. The copyright in musical compositions is more extensively protected than the copyright in dramatic pieces (7).

There is copy-
right in tables

83. A person may have copyright in tables calculated by himself,

(1) *Dilly v. Doig*, 2 Ves. J. 486; and
v. Hudson v. Maddison, 12 Sim. 416;
Pollock v. Lester, 11 Hare 274; *Cowley*
v. Cowley, 9 Sim. 299.

(2) *Carnan v. Bowles*, 2 Bro. C. C. 80.
- (3) *Anon. Loft. R.* 775 (*Newbery's*

Case); *Gyles v. Wilcox*, 2 Atk. 143.

(4) *Gyles v. Wilcox*, 2 Atk. 141; *et*
v. Bell v. Walker, 1 Bro. C. C. 451.

(5) *Dodsley v. Kinnersly*, Amb. 403.

(6) *Blackwell v. Harper*, 2 Atk. 95.

(7) *Russell v. Smith*, 15 Sim. 181.

even though the very same tables should have been published long before his appeared (1). But *quære*, whether an injunction will be granted to protect a copyright in tables founded on the author's personal calculation of them, when they are of such a nature that the same calculation could be made within a short time by any other person (2).

84. An injunction will not be granted where, according to the case made by the plaintiff, there has been long acquiescence under the injury against which he at length seeks protection (3).

85. Where there is a fair doubt whether the Law would give damages for the piracy of a work, a Court of Equity will not maintain an injunction granted *ex parte*, but will leave the plaintiff to establish his legal right before it interferes in his behalf (4).

injunction not maintained—plaintiff must first establish his legal right.

86. Where the copyright of a work had been assigned by the author to the plaintiff, and the plaintiff and author swore that A. (a stranger to the suit) had only a qualified interest in the work, but A., in an affidavit filed by the defendant, swore that, under a bargain between him and the author, he had the entire copyright of the work, but did not state any deed of assignment; the plaintiff was held not entitled to an injunction till he had established his right at Law (5).

87. Where a person had composed certain tales for a party, the defendant, for publication in the 'London Journal,' of which he was the proprietor, Vice-Chancellor Sir J. Stuart held, at the suit of the author, that the subsequent publication of such tales in a weekly supplementary number for sale with or without the current number, was a publication separately within 5 & 6 Vict. c. 45, s. 18, and granted an injunction accordingly (6).

88. The compiler of a directory or a guide book, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry by

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calculated by one's self, and though same tables are already published.

Long acquiescence is a bar to relief.

Where there is fair doubt whether the Law would give damages for the piracy

—*ex parte*

plaintiff's right was contradicted by defendant's evidence, no injunction was granted until right established at Law.

The publication of tales, already published in a journal—in a weekly supplementary number—are a publication separately, within 5 & 6 Vict. c. 45, s. 18.

Compiler of directory or guide-book, must obtain his information independently—but he may

(1) *Baily v. Taylor*, 1 Russ. & My. 73, 76; 3 L. J. (Ch.) 68.

(4) *Byron (Lord) v. Dugdale*, 1 L. J. (Ch.) 239.

(2) *Ib.*

(5) *Loundes v. Duncombe*, 1 L. J. (Ch.) 51.

(3) *Ib.*

(6) *Smith v. Johnson*, 4 Giff. 632.

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verify the correctness of his own results by previous works.

No relief if false registration of date of publication.

No copyright by registration before actual publication. The mere declaration of an intention to publish a magazine or any manufactured article bearing a particular name or mark, cannot create a right to exclusive use of such name or mark—nor will expenditure do so.

adopting and republishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself, and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results (1).

89. A Court of Equity will afford no relief against an alleged piracy of the title of a magazine where the proprietor has made a false registration as to the date of its publication (2); and when a proposed magazine with a particular title had been registered, no number of the magazine having then been published, and the entry of the date of publication was filled in with the date at which the registration was effected, and no magazine was in fact published till some time after the date of registration, the registration was held by Vice-Chancellor Sir J. Stuart wholly ineffective; and he also held that a Court of Equity would not, under such circumstances, grant an injunction against another person who published a magazine with the same title, whether he commenced publishing before or after the party who sought the injunction (3).

And no copyright can be acquired, under 5 & 6 Vict. c. 45, by registration of a book at Stationers' Hall before the actual publication of the work registered (4); and the mere declaration of an intention, however public, to publish a magazine or any manufactured article bearing a particular name or mark, notwithstanding that such declaration is accompanied by expenditure in connection with the intended article, cannot create a right to the exclusive use of such name or mark as a trade-mark; and in this case, where H., in 1863, had registered an intended new magazine to be called 'Belgravia,' and in 1866, such magazine not having appeared, M., in ignorance of what H. had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September as about to appear in October; and H., knowing of this, made hasty preparations for bringing out his own magazine before that of M. could

(1) *Kelly v. Morris*, L. R. 1 Eq. 697.

(2) *Maxwell v. Hogg*, *Hogg v. Maxwell*, 12 Jur. (N. S.) 916.

(3) *Ib.*

(4) *Maxwell v. Hogg*, *Hogg v. Maxwell*, L. R. 2 Ch. 307; *Correspondent Newspapers Company, Limited v. Saunders*, 11 Jur. (N. S.) 540.

appear, and in the meantime accepted an order from M. for advertising M.'s magazine on the covers of his own publications; and the first day on which he informed M. that he objected to his publishing a magazine under that name was the 25th of September, on which day the first number of H.'s magazine appeared; the Lords Justices, affirming the decision of Vice-Chancellor Sir J. Stuart, held that M.'s advertisements and expenditure did not give him any exclusive right to the name 'Belgravia,' and that he could not restrain H. from publishing a magazine under the same name, the first number of which had appeared before M. had published his; but that H.'s registering the title of an intended publication could not give him a copyright in that name, and that he had not acquired any right to restrain M. from using the name, as being H.'s trade mark (1).

The registration of a title of an intended publication does not give copyright in the title.

90. Where A., being clerk and registrar of the London Coal Market, was in the habit of publishing, under the authority of the Corporation, at a considerable profit to himself, statistical returns, extracted from the Corporation books, of which he had the custody, of all coal imported into London, such returns being published annually in sheets, and supplied to subscribers at a cost of 3*l.* 3*s.* per annum; and since 1863 the words "Copyright reserved" had been printed upon all copies, and the work had been registered at Stationers' Hall, under the provisions of 5 & 6 Vict. c. 45; and in a work published under the authority of the Lords of the Treasury, giving the mineral statistics of the United Kingdom during preceding years, and published at a cost of 2*s.* 6*d.*, the returns compiled and published by A. for the last nine years were introduced into the edition for 1866 (the source from which this information was derived being prominently acknowledged), and formed one-third of the whole of defendant's work; Vice-Chancellor Sir W. P. Wood held, that, having regard to the quantity and matter of the information which had been taken and re-published without the exercise of any independent thought and labour, and the prejudice to A. in having the sale of his work superseded by this republication, in a cheap form, of his labours, A. was entitled to an injunction. The result, in such cases, is the true test of the act, and full acknow-

Full acknowledgment of

(1) *Maxwell v. Hogg, Hogg v. Maxwell, L. R. 2 Ch. 307*; *Newspapers Company, Limited v. Correspondent Saunders*, 11 Jur. (N. S.) 540.

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the original,
and absence
of dishonest

intention, do not excuse appropriation where the effect is to supersede the sale of the original work.—The true test is the result.

A newspaper
is not within
Copyright Act,
5 & 6 Vict.
c. 45, as to
registration,
but proprietor
can restrain
piracy.

ledgment of the original, and the absence of any dishonest intention, will not excuse the appropriator where the effect of his appropriation is, of necessity, to injure and supersede the sale of the original work (1).

91. A newspaper is not within the Copyright Act, 5 & 6 Vict. c. 45, for the purposes of registration under that Act; but the proprietor of a newspaper has, without registration, such a property in every article for which he pays, under the 18th section of the Act, or by the general rules of property, as will entitle him to prohibit any other person from publishing the same thing in any other newspaper or in any other form (2). However, where the proprietor of a newspaper sought to restrain the piracy of "a list of hounds" the Court was of opinion that, although the piracy might be established, the list was liable to such frequent changes, and a correct list was so easily obtained, that it was not a case for an interlocutory injunction (3).

92. Although the compiler of a new directory is not justified in using slips cut from one previously published for the purpose of deriving information from them for his own work, yet he may use such slips for the purpose of directing him to the parties from whom such information is to be obtained (4).

Assignee of
foreign dra-
matic work,
must register
a translation.

The transla-
tion must be
of the whole.

93. The assignee of a foreign dramatic work, in order to entitle himself to the exclusive right to represent it on the stage in English, must register a translation, and such translation must be sufficiently literal to enable an Englishman to see from it the character of the original work, and the translation must be a translation of the whole work (5). And where the original work sought to be protected was a French comedy, entitled '*Frou-frou*,' and the version sanctioned by the foreign authors, and published in England, was entitled '*Like to Like*,' and the names of the characters and the scenery were changed from French to English.

(1) *Scott v. Stanford*, L. R. 3 Eq. 718.

(2) *Cox v. Land and Water Journal Company*, L. R. 9 Eq. 324; 39 L. J. (Ch.) 152; 18 W. R. 206; 21 L. T. (N. S.) 548.

(3) *Ib.*

(4) *Morris v. Wright*, L. R. 5 Ch. 279; 18 W. R. 327.

(5) *Wood v. Chart*, *Wood v. Wood*, 39 L. J. (Ch.) 641; L. R. 10 Eq. 193; 22 L. T. (N. S.) 432; 18 W. R. 822.

and in some instances English manners were substituted for French, and considerable omissions of speeches and alterations of passages were made; Vice-Chancellor Sir W. M. James held, that the version was not a translation within the meaning of the International Copyright Act of 1852 (15 & 16 Vict. c. 12, s. 8) such as to entitle the foreign authors and their assignee to the benefit of the statute (1).

94. There is no monopoly in the theory of an author, nor in the theories and speculations by which he has supported it (2). No monopoly in a theory.

95. The author of a published work cannot prohibit a subsequent writer from making use of the authorities quoted by him, even if it is proved that the latter was put on the track of these authorities by reading the earlier work; but the subsequent writer must, *bonâ fide*, go to the common sources, and not copy the quotations or passages from the earlier work. But the taking of a single quotation without verification, and of a single argument founded on facts stated in the earlier book, are not sufficient grounds for granting an injunction (3). If any part of a work complained of is a transcript of another work, or with only colourable additions and variations, and prepared without any real, independent literary labour, such portion of the work complained of is piratical (4). But it is impossible to establish a charge of piracy where it is necessary to track mere passages and lines through hundreds of pages, or where the authors of a work challenged as piratical have honestly applied their labours to various sources of information (5). A subsequent writer cannot be restrained using authorities quoted by prior author. But subsequent author must go to the common sources, and not copy the quotations in earlier work. Taking single quotation or argument not sufficient for injunction. No piracy where necessary to track mere passages and lines through hundreds of pages, or where honest application of labour to various sources.

96. In registering a copyright in the registry-book of the Stationers' Company, in pursuance of 5 & 6 Vict. c. 45, ss. 13, 24, it is not sufficient to enter the month and year in which the first publication takes place, but the day of the month of the first publication must be stated, and unless this be done no suit can be maintained to restrain infringement of copyright (6); and if the date of the first publication of a work is erroneously stated in The day of the month of first publication, as well as month and year, must be registered.

(1) *Wood v. Chart*, *Wood v. Wood*, 39 L. J. (Ch.) 641; L. R. 10 Eq. 193; 22 L. T. (N. S.) 432; 18 W. R. 822.

(2) *Pike v. Nicholas*, 39 L. J. (Ch.) 435; L. R. 5 Ch. 251; 18 W. R. 321.

(3) *Ib.*

(4) *Jarrold v. Heywood*, 18 W. R. 279.

(5) *Ib.*

(6) *Mathieson v. Harrod*, L. R. 7 Eq. 270; 38 L. J. (Ch.) 139; 19 L. T. (N. S.) 629; 17 W. R. 99.

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Assignor is, in absence of special contract, entitled to sell copies printed before assignment.

Plagiarism not necessarily piracy. No one is allowed to take material and substantial portions of a work to make or improve a subsequent publication.

Damages in piracy are the profits of copies sold by defendant.

Copyright may be claimed in part of a work.—In registering the work the part need not be distinguished.

Plaintiff has a right to a discovery of the sources of defendant's work.

the registration the registration is of no effect, and no suit can be brought to restrain the infringement of such copyright (1).

97. In the absence of special contract to the contrary, the assignor of a copyright is entitled, after the assignment, to continue selling copies of the work printed by him before the assignment, and remaining in his possession (2).

98. Plagiarism does not necessarily amount to a legal invasion of copyright; but no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of the published work, or of the argument, illustrations, or authorities, of another author, for the purpose of making or improving a subsequent rival publication (3).

99. In estimating damages in cases of literary piracy the defendant must account for every copy sold as if it had been the plaintiff's, and pay the profit upon those copies to the plaintiff (4).

100. Although copyright may be claimed in part only of a work, the whole of which work is registered, and it is not necessary in the registration to distinguish that part, yet the part in which copyright is claimed should, in a bill, be distinguished, otherwise the costs unnecessarily incurred must be borne by the plaintiff (5).

101. A plaintiff has a right to a full and particular discovery as to the original sources from which the defendant alleges himself to have drawn his work (6).

102. When the infringement complained of consists in copying a collection of facts which are easily obtained, the Court will not grant an interlocutory injunction, which would be useless, but will wait till the hearing, and then, if necessary, direct a reference as to damages (7).

103. A rival publisher is not less liable to an injunction for piracy because he makes inquiries on his own behalf to ascertain the correctness of what he copies (8).

(1) *Page v. Wisden*, 17 W. R. 483; 20 L. T. (N. S.) 435.

(2) *Taylor v. Pillow*, L. R. 7 Eq. 418.

(3) *Pike v. Nicholas*, 38 L. J. (Ch.) 529; 20 L. T. (N. S.) 906; 17 W. R. 842.

(4) *Ib.*

(5) *Page v. Wisden*, 17 W. R. 483; 20 L. T. (N. S.) 435.

(6) *Kelly v. Wyman*, 17 W. R. 399.

(7) *Cox v. Land and Water Journal Company*, 18 W. R. 206; 21 L. T. (N. S.) 548.

(8) *Morris v. Ashbee*, 19 L. T. (N. S.) 550; L. R. 7 Eq. 84.

104. Where, in a trades' directory, persons who chose to pay for the privilege got their names printed in capital letters, with additional descriptions of their trade or business, called "extra lines," Vice-Chancellor Sir G. M. Giffard held, that such payment had not the effect of making the information common property, so as to enable the compiler of a rival directory to reprint it from slips cut from the first, even where the persons whose names were so printed had been applied to, to verify the information contained in the first directory, and had not only authorized, but had actually paid for the insertion of their names in the second, with the distinctive features of capital letters and extra lines (1).

105. A suit was instituted between B. and H. as to the proprietorship of a newspaper, in which it was ultimately decided that they were entitled in equal moieties. During the progress of the suit B. assigned his share in the newspaper, and the right of publication, and in the profits thereof, to W. The assignment contained a recital of the proceedings in the suit, and a power of sale. Afterwards B. mortgaged the same share to his partner H., to secure sums due to H. in respect of that share. W. registered his assignment at Stationers' Hall, under 5 & 6 Vict. c. 45, and subsequently sold the mortgage share to the plaintiff, under his power of sale. Both W. and the plaintiff permitted the newspaper to be carried on by B. and H. jointly. On a bill filed by the plaintiff for a declaration that he was entitled to a moiety of the newspaper, the Court held, first, that there is nothing analogous to copyright in the name of a newspaper, and therefore the registration of the assignment at Stationers' Hall was futile; but that the proprietor has a right to prevent any other person from adopting the name, and that this right is a chattel capable of assignment; secondly, that as W. and the plaintiff knew of the suit between B. and H., and also permitted them to carry on the newspaper as partners, the plaintiff could only take B.'s share subject to the equities subsisting between the partners (2).

There is nothing analogous to copyright in the name of a newspaper, and registration of assignment is futile. But proprietor has a right to prevent others adopting the name, and the right is a chattel interest assignable.

106. The object of 5 & 6 Vict. c. 45, s. 6, was to obtain for the British Museum a copy of every book published anywhere under 6, 5 & 6 Vict. c. 45, is to obtain a copy of every book whether copyright or not.

(1) *Morris v. Ashbee*, L. R. 7 Eq. 34. 703; 37 L. J. (Ch.) 917; 19 L. T.
(2) *Kelly v. Hutton*, L. R. 3 Ch. (N. S.) 228; 16 W. R. 1182.

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British rule, whether there should be copyright in the book or not (1).

107. By the Constitution of the United States, Congress is empowered to promote the progress of science and the useful arts by securing, for limited times, to authors and inventors the exclusive right to their writings and discoveries; and, by successive Acts of Congress, the power of issuing injunctions in this class of cases is expressly vested in the Courts of the United States (2).

108. An injunction *pendente lite* should not be granted on light grounds, nor in doubtful cases, but should await the full proof upon the final hearing (3).

109. A bill in Equity against three defendants made title on its face in the plaintiff to a copyright, and shewed a wrongful and wilful violation of it by all the defendants, and serious injuries inflicted by, and apprehended from, such violation, and prayed for an injunction against all the defendants, and for a discovery from all; on general demurrer it was held, that the relief by injunction was not dependent upon the discovery prayed for, but rested on the equities set forth in the bill, and might be refused or granted irrespective of the discovery, although the bill was bad as a bill of discovery (4).

Prints.

110. In *Martin v. Wright* (5), where A. made a copy of a print, 'Belshazzar's Feast,' invented by the painter Martin, in colours, and of larger dimensions, and exhibited it as a diorama, Vice-Chancellor Sir L. Shadwell, upon the construction of the then Acts relating to copyright in prints (6), particularly 17 Geo. 3, c. 57, refused to restrain the exhibition, until the rights had been esta-

(1) *Routledge v. Low*, L. R. 3 H. L. 100; 37 L. J. (Ch.) 454; 18 L. T. (N. S.) 874; 16 W. R. 1081.

(2) *Hilliard*, Inj. 469.

(3) *Redfield v. Middleton*, 7 Posw. 649 (Amr.)

(4) *Atwill v. Ferrett*, 2 Blatch, Cir. Ct. 39 (Amr.)

(5) 6 Sim. 297.

(6) The Acts creating copyright in prints, engravings, and etchings, are 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57. These Acts are extended to Ireland by 6 & 7 Will. 4, c. 59; and extended to lithographs by

15 & 16 Vict. c. 12, s. 14; and prints and engravings forming part of a book are protected by 5 & 6 Vict. c. 45, and need not comply with the requisitions of the statutes, *ante*. But under the International Copyright Act, 7 & 8 Vict. c. 12, s. 19, the inventor, designer, or engraver of a print first published abroad, may obtain protection on complying with 8 Geo. 2, c. 13. Copyright in sculpture depends on 54 Geo. 3, c. 56; copyright in original drawings, paintings, and photographs, depends on 25 & 26 Vict. c. 68.

blished at law; and said that it appeared to him that the 17 Geo. 3, c. 57, never was intended to apply to a case where there was no intention to print, sell, or publish, but to exhibit in a certain manner, and also said that if Martin had exhibited his picture as a diorama then he might have been entitled to an injunction.

111. Prints engraved and struck off abroad, but published here, are not protected from piracy by the statutes of 8 Geo. 2, c. 13, 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57 (1).

112. Where S., the proprietor of a periodical called 'Good Words,' agreed verbally with G. to purchase the right to engrave certain photographs to illustrate in 'Good Words,' G. reserving the right to use them in any other publication, and subsequently signed a receipt for "the use of photographs in 'Good Words' reserving all right to issue the same in any other publication," and afterwards commenced publishing in a separate volume these articles, illustrated by engravings from the same photographs; and G. brought an action under the 25 & 26 Vict. c. 68 ("An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works") for damages and for a writ of injunction; and S. filed a bill for a declaration that under the verbal agreement he was entitled to republish the engravings taken from G.'s photographs, for specific performance of an alleged verbal agreement to grant a license to use the photographs for the purpose of engraving and publishing in 'Good Words,' or in any republication of the articles which they illustrated, and that the action at law might be restrained; Vice-Chancellor Sir R. Malins held, that the verbal agreement extended to the use of the photographs in 'Good Words' only, that there was no part performance by G. of a contract or license by G. to publish in a separate form, and that S. had no equity, inasmuch as by 25 & 26 Vict. c. 68, s. 3, every leave or license for the publication of photographs must be in writing, and dismissed the bill with costs (2).

Paintings,
Drawings,
Engravings,
Photographs.

Works of the
Fine Arts.

113. There may be copyright in a photograph taken from an engraving of a painting (3).

(1) *Page v. Townsend*, 5 Sim. 395, v. ante, pl. 110, n. (6).

(2) *Strahan v. Graham*, 16 L. T. (N. S.) 87; 17 L. T. (N. S.) 57; 15 W. R. 487. (3) *Walker, Ex parte, Graves, In re*, 39 L. J. (Q. B.) 31.

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114. In *Jefferys v. Baldwin* (1) it was held that one employing a painter to draw a drawing was not entitled to the protection of the then statute, 8 Geo. 2, c. 13. In *Blackwell v. Harper* (2) it was held that the then Act, 8 Geo. 2, c. 13, was not confined to works of invention only, but meant the designing or engraving anything that was already in nature, and that a print published of any building, house, or garden, fell within this Act, and that the property in the print vested absolutely in the engravers, though the day of publication was not mentioned in it.

SECT. 3. *Copyright in Designs.*

1. In *M'Crea v. Holdsworth* (3) the plaintiff, who had invented a design, and registered it under statutes 5 & 6 Vict. c. 100 and 6 & 7 Vict. c. 65, obtained an injunction against a defendant who had manufactured with that pattern, but did not intend the same for sale until after the expiration of the plaintiff's term of protection, restraining the defendant generally, and ordering all articles manufactured, and things used for the manufacture, to be delivered up to be destroyed.

2. Where a piece of manufacture with a design impressed upon it is registered without any explanation or addition in writing, and that design consists of several parts not necessarily united in configuration, but capable of being severed into independent integral parts, then the design registered is the entire thing, exactly as it is described in the pattern furnished to the registrar, and such registration is therefore not open to the objection of uncertainty, but is valid according to 21 & 22 Vict. c. 70, s. 5 (4).

3. Where the plaintiff registered as a design a pattern consisting of a combination of distinct designs, and the defendant slightly altered the combination, but not so as to affect the general appearance of the pattern, it was held that this was an infringement of the copyright in the pattern; Lord Chancellor Hatherley said, here the combination is protected, and if there is any

(1) Amb. 164.

(2) 2 Atk. 93.

(3) 12 Jur. 820.

(4) *Holdsworth v. M'Crea*, L. R.
2 H. L. 380; 16 W. R. 226.

difference of effect, it will be left to the jury to say whether the two things are in effect the same. But that the House of Lords in *Holdsworth v. McCre* (1) did not pretend to say that if the difference were infinitesimal you should escape from what is right and just, and that he held in this case that the patterns were used in substantially the same manner (2).

4. In *Sheriff v. Coates* (3) it was held that equitable jurisdiction upon the 34 Geo. 3, c. 23 (Calico Printers Act), was not excluded by the special remedy thereby provided; and that, independent of that remedy, the statute vested in the inventor a right of property, which, though only of three months' duration, Equity would protect by injunction, if the title were satisfactorily established. But in this case the evidence as to title not having been conclusive, the injunction was dissolved and an issue directed, the defendants keeping an account.

An inventor's right of property, though only of three months' duration, will be protected.

5. The Court will itself compare and decide upon alleged piracies by inspection, where that can be easily and safely done (4).

Court will itself compare and decide piracies by inspection if easily and safely to be done.

6. By the Copyright of Designs Act, 5 & 6 Vict. c. 100, s. 4, no person is to have the benefit of the Act unless every article has attached thereto the letters "R^d," but although a bill to prevent an infringement did not allege that this had been done, yet the Master of the Rolls (Lord Romilly) held, that the bill was not on that ground alone open to a demurrer (5). But the Court held that the copyright of a registered design is lost if the proprietor (whether English or foreign) sells the registered article abroad without the letters "R^d," being attached thereto, as required by the 5 & 6 Vict. c. 100, s. 4, and 24 & 25 Vict. c. 73 (6); as the benefit of the Acts is forfeited unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold abroad or in the British dominions (7).

The copyright of a registered design is lost, if proprietor sells it abroad without "R^d." attached.

7. Where four old designs were respectively applied to three ribbons, and to a button, and the three ribbons were then united to

(1) *Ante*.

(5) *Sarazin v. Hamel*, 32 Beav. 145;

(2) *McRea v. Holdsworth*, 19 W. R. 9 Jur. (N. S.) 192; 32 L. J. (Ch.) 378, 36; 23 L. T. (N. S.) 444. 380.

(3) 1 Russ. & My. 159.

(6) *Sarazin v. Hamel*, 32 Beav. 151;

(4) *Ib*.

9 Jur. (N. S.) 192; 32 L. J. (Ch.) 380.

(7) *Ib*.

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the button so as to form a badge, and the badge was then registered under 5 & 6 Vict. c. 100; Vice-Chancellor Sir W. P. Wood held, that this union did not amount to a new design within the statute, and refused an injunction to restrain the manufacture and sale of a similar combination (1).

8. The distinction between the 5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 65 (2), is this, namely, that the first Act applies to new designs for the ornamentation of articles of utility. And where a design of a carriage was registered under the 6 & 7 Vict. c. 65, and the inventor claimed four things as new and as conducive to the utility of the design, but there was no novelty as to three of them, and they did not contribute to the utility, though the fourth tended to its utility; yet, as it was the mere extension of a well-known principle, the Master of the Rolls (Lord Romilly) held that the claim to a monopoly could not be supported under the 6 & 7 Vict. c. 65, and that the design was not protected under 5 & 6 Vict. c. 100, as an ornamental design, it not having been registered under that Act (3).

The furnishing the registrar a specimen of the article to which the design was applied, is a compliance with sect. 15 of 5 & 6 Vict. c. 100.

9. The provisions of the Copyright of Designs Act, 1842, 5 & 6 Vict. c. 100, s. 15, relative to furnishing the registrar of designs with copies, drawings, or prints of the design to be registered, previously to obtaining registration, were, by Vice-Chancellor Sir W. P. Wood, held to have been complied with by furnishing him a specimen of the article to which the design was applied (4).

10. In a suit to restrain an alleged infringement of a copyright in a design registered under the 5 & 6 Vict. c. 100, the defendant does not lose his right to require the plaintiff to establish his title in an action at law, although he delays doing so until the hearing of the cause, and has previously moved to dissolve upon a ground which cannot be maintained. But the defendant was ordered to pay the costs of the motion to dissolve, that motion having become a simply useless motion, whatever might be the result of the cause; and the bill was retained and the injunction continued in the meantime, the plaintiff undertaking to bring an action (5).

(1) *Mulloney v. Stevens*, 10 L. T. (N. S.) 190. the 5 & 6 Vict. c. 100.

(2) This Act and 13 & 14 Vict. c. 104, 21 & 22 Vict. c. 70, and the 24 & 25 Vict. c. 73, amended and extended (3) *Windover v. Smith*, 32 Beav. 200.

(4) *Norton v. Nicholas*, 4 K. & J. 475.

(5) *Ib.*

11. In *Dalglish v. Jarvis* (1) it is *queried* whether in the condition of copyright mentioned in the 4th section of the Designs Copyright Act (5 & 6 Vict. c. 100) that the design has, before publication, been registered, the term "publication" is limited to publication after the design has been embodied and introduced into some fabric. And in the same case (2) it is *queried* whether the nine months' copyright given by the 5 & 6 Vict. c. 100, in any designs ornamenting articles of manufacture, dates from the publication of the manufacture, or from the publication of the design.

12. The protection of copyright for three years, granted by 6 & 7 Vict. c. 65, to "any new or original design for any article of manufacture, having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article," is not clearly applicable to the design of a "protector label," which consisted in making in the label an eyelet-hole, and lining it with a ring of metallic substance, through which a string attaching the label to packages passed; and the Court refused to grant an injunction, before the hearing, against an infringement of such design (3). And *quære*, what is the meaning of the words "shape and configuration" in this Act (4).

13. The provisions of the 6 & 7 Vict. c. 56, are to be construed strictly (5). Therefore a bill filed by a plaintiff to restrain the sale of certain articles of improved furniture, who was shewn to have sold similar articles without having the word "registered" and the date of registration notified on such articles, was dismissed with costs (6).

Provisions of
6 & 7 Vict.
c. 56, are con-
strued strictly.

SECT. 4. *Trade Marks.*

1. Though there is no exclusive ownership of the symbols which constitute a trade mark apart from the use or application of them, yet the exclusive right to use such mark in connection with a vendible commodity is rightly called property, and the jurisdiction of a Court of Equity to restrain the infringement of a trade mark

No exclusive
ownership of
symbols con-
stituting a
trade mark
apart from
their use—
but the ex-

(1) 1 Sim. (N. S.) 336.

Sm. 420.

(2) *Dalglish v. Jarvis*, 2 Mac. & G.

(4) *Ib.*

231; 2 H. & T. 437.

(5) *Pierce v. Worth*, 18 L. T. (N. S.)

(3) *Margetson v. Wright*, 2 De G. &

710.

(6) *Ib.*

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clusive right to use the mark is property, and the jurisdiction of the Court is founded on such property, not upon the fraud against the public.

No protection for trade mark, unless applied by defendant to same kind of goods—and causes mistakes—and prejudicial to plaintiff.

Trade mark containing a material misrepresentation, not protected.

If a name upon a commodity passes current as a representation that the article was manufactured by a particular person, Court will not transfer it to another, without addi-

is founded upon the invasion of such property, and not upon the fraud committed on the public, and also upon the fact that an injunction is the only mode by which the property can be protected (1). And the jurisdiction of the Court in the protection of trade marks resting upon property, fraud in the defendant is not necessary for the exercise of the jurisdiction (2).

2. The Court will not interfere for the protection of a trade mark unless the mark used by the defendant is applied by him to the same kind of goods as the goods of the plaintiff, and is such that it may be, and is, mistaken in the market for the trade mark of the plaintiff, and the plaintiff must prove that the defendant has used the mark so as to prejudice him in his business (3).

3. If a trade mark contains a material misrepresentation as to the character of the goods to which it is applied, the Court will not interfere to protect the use of it, even though the misrepresentation should be so obvious that no purchaser would be deceived (4). And where a company having a patent for tanned leather-cloth was in the habit of stamping as part of their trade mark the words "tanned leather-cloth, patented," on all their goods, whether tanned or not, Lord Chancellor Westbury held, reversing a decision of Vice-Chancellor Sir W. P. Wood, that the use of those words on goods not tanned disentitled the company to relief against an infringement of the trade mark, and the bill was dismissed, but, as the Lord Chancellor disapproved of the conduct of the defendant, without costs (5).

4. If a name impressed upon a vendible commodity passes current in the market as a representation that the commodity has been manufactured by a particular person, the Court would not transfer to another person the right to use the name simply and without addition, but if it sold the business carried on by the owner of the name, it might give to the purchaser the right to represent himself as the successor in business of the first maker,

(1) *Leather Cloth Company v. (N. S.) 561.*

American Leather Cloth Company,
33 L. J. (Ch.) 199; 10 Jur. (N. S.) 81;
9 L. T. (N. S.) 558.

(2) *Hall v. Barrows*, 33 L. J. (Ch.)
204; 10 Jur. (N. S.) 55; 9 L. T.

(3) *Leather Cloth Company v. American Leather Cloth Company,*
33 L. J. (Ch.) 199; 10 Jur. (N. S.) 81;
9 L. T. (N. S.) 558.

(4) *Ib.*

(5) *Ib.*

and in that manner to use the same name. But where a name once affixed to a manufactured article continues to be used after the death of the manufacturer, the name in time becomes a mere trade mark or sign of quality, and ceases to denote, or to be current as indicating, that any particular person was the maker, and would therefore be protected. (1). And a trade mark consisting of the initials of the first manufacturers of the goods, may, in the course of time, become a mere mark of quality, without implying a guarantee that the goods are still manufactured by the same traders; and such a mark will be protected by the Court on the ground of property (which is the true ground of the jurisdiction of the Court in the protection of trade marks), even in the absence of fraud. Such a mark is also valuable property of a partnership, and may be sold along with the partnership assets (2).

5. Where M. & Co. were manufacturers of liquorice, and having made in this country a new description of goods from a mixture of juice extracted from roots obtained from Anatolia and Spain, they stamped upon the manufactured article the mark "Anatolia," and sold it to the public, and acquired a reputation for it in the market, and this was the first use of the word in this way, though juice had previously been imported from Anatolia; and the mark, about six weeks after its use, during which time it had become known in the market, was imitated by B., at the request of a customer, and attached to their liquorice made from Spanish roots; Lord Chancellor Westbury held, affirming the decision of Vice-Chancellor Sir W. P. Wood, that the word "Anatolia" so used was a trade mark, and that there had been a sufficient user and adoption of it by M. & Co. to give them a property in it as such (3).

6. The elements of the right to property in a trade mark may be represented as being the fact of the article being in the market as a vendible article with the stamp or trade mark at the time the defendant imitates it. The essential qualities for constituting that property would, Lord Chancellor Westbury said, probably

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tion—but a purchaser of the business may represent himself as successor and use the name—and if name is used after death of manufacturer, it becomes in time a trade mark or sign of quality and will be protected. Such a mark is property of a partnership, and may be sold with the assets of the partnership.

Some of essential qualities to constitute property in trade mark are probably —mark not

(1) *Leather Cloth Company v. American Leather Cloth Company*, 33 L. J. (Ch.) 199; 10 Jur. (N. S.) 81; 9 L. T. (N. S.) 558. (2) *Ib.* (3) *McAndrew v. Bassett*, 10 Jur. (N. S.) 492, 550; 33 L. J. (Ch.) 561.

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copied, no
false repre-
sentation, and
article
vendible.

Infringement
of a trade
mark, though
in ignorance
of the right
of another
party, will be
restrained,
but no account
or compen-
sation.

Negotiations
previous to a
suit (save bad
faith) not
regarded
unless a release or binding agreement.

It is not
necessary to
shew buyer
is deceived,
if the goods
are supplied
to be sold
again.

be found these: first, that the mark had been applied by the plaintiffs properly, that is to say, that they had not copied any other person's mark, and that the mark did not involve any false representation; secondly, that the article so marked was actually a vendible article in the market; and thirdly, that the defendants, knowing that to be so, had imitated the mark for the purpose of passing in the market other articles of a similar description (1). But it seems settled that the knowledge of the party is not necessary to entitle a plaintiff to an injunction, in such a case. In *Edelsten v. Edelsten* (2) it was held that if A. has acquired property in a trade mark, which is afterwards used by B. in ignorance of A.'s right, A. is entitled to an injunction but not to an account or compensation, except in respect of any user by B. after he became aware of the prior ownership. And the Court will restrain the use by one tradesman of the trade marks of another, although such marks had been used in ignorance of their being any person's property, and under the belief that they were merely technical terms (3).

7. Where the plaintiff attached to wire manufactured by him tallies marked with an anchor, and the defendant attached to his manufacture similar tallies marked with the device of an anchor surmounted by a crown, the Court held this was a colourable imitation, and that the plaintiff was entitled to an injunction (4).

8. Negotiations antecedent to a suit (save in a case of bad faith) unless amounting to a release or binding agreement cannot be regarded (5).

9. An owner of a trade mark will not be deprived of remedy in Equity, even if it is shewn that all who bought goods bearing the mark from the defendant were well aware that the goods were not of the plaintiff's manufacture. It is enough if the goods were supplied by the defendant for the purpose of being sold again.

(1) *McAndrew v. Bassett*, 10 Jur. pl. 21, *post*.
(N. S.) 492, 550; 33 L. J. (Ch.) 561.

(2) 1 De G. J. & S. 185; 9 Jur. 338.

(N. S.) 479; 11 W. R. 328; *et v. Moet v. Couston*, 33 Beav. 578; 10 Jur. (N. S.) 1012; 10 L. T. (N. S.) 395; *Harrison v. Taylor*, 11 Jur. (N. S.) 408; *et v.*

(3) *Millington v. Fox*, 3 My. & Cr. 338.

(4) *Edelsten v. Edelsten*, 1 De G. J. & S. 185; 9 Jur. (N. S.) 479; 11 W. R. 328.

(5) *Ib.*

in the market; nor is it necessary to shew that any person was deceived if the resemblance of the articles is such as would be likely to cause one mark to be mistaken for the other (1). It is not necessary to shew any person deceived if resemblance likely to cause one mark to be taken for the other.

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10. If a personal trade mark is in any respect less assignable than one referring to locality only, or a mere device, the distinction must be limited to cases where the mark is so clearly personal as to import that the goods bearing it are manufactured by a particular person; and, *semble*, even in that case the objection is rather to the right of using the mark than to its assignable quality.

And a corporation trade mark granted by the Cutlers' Company to a non-freeman is assignable. But whether a trade mark granted by the Cutlers' Company be legally assignable or not, a person who has purported to assign it for valuable consideration cannot dispute the validity of the assignment. And where B., being a non-freeman of the Cutlers' Company, had acquired by grant from that company a corporate trade mark, consisting of the figure of a lion, and the letters "J. B. O. S.," and had also acquired, by purchase from William Ash, the right to the exclusive use of a trade mark "Wm. Ash & Co.;" and he subsequently entered into partnership, and by the articles then executed it was agreed that the corporate trade mark, used with such other mark as might be agreed upon, should be a partnership asset; and it was also agreed that at the expiration of the partnership the several partners should have the free use and enjoyment of the corporate trade mark for the remainder of their lives, either alone or in partnership with any other persons; and the firm, after carrying on business, in the course of which both the corporate trade mark and the mark "Wm. Ash & Co." were used, fell into difficulties, and the partners assigned all their estate and effects, both joint and separate, to trustees for creditors, by a deed which empowered the trustees to sell the trade, plant, &c., as a going concern, and they accordingly afterwards sold the concern to H. B., and assigned to him the partnership property, and the corporate trade mark and the other marks of the firm, so far as they lawfully could; and shortly afterwards B. entered into an agreement with B. & Co. by which he authorized them to use the corporate mark,

A corporation trade mark granted by the Cutlers' Company is assignable—but whether so or not, assignor is estopped disputing validity of assignment.

(1) *Edelsten v. Edelsten*, 1 De G. J. & S. 185; 9 Jur. (N. S.) 479; 11 W. R. 328.

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and he also used the corporate mark and the mark "Wm. Ash & Co." himself; upon a bill filed by H. B. to restrain B. from so doing, the Lords Justices held, upon an appeal from the Master of the Rolls, who had held that B. was entitled to use the trade mark himself, or to allow any person in partnership with him to use it, but granted an injunction to restrain B. from granting the use of the trade mark to any person not in partnership with him, that H. B. was entitled to the exclusive use of both trade marks, and granted an injunction accordingly (1). Upon the formation of a partnership with a person entitled to the benefit of a trade mark, in the absence of express provision in relation to it, it becomes an asset of the partnership, *per* Turner, L.J. (2).

The introduction into market of an article new as an article of commerce though previously known, and the acquiring a reputation therefrom by a name not merely descriptive, entitle the name to be protected—and this though the peculiarity of the name has been in use as applied to a different kind of goods.

11. Where any one introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, the Court will protect the use of that name, and no other person will be permitted to sell a similar article under the same name; and this, although the peculiarity of the name has long been in common use as applied to goods of a different kind. And it will make no difference that the plaintiff has also a trade mark which has not been taken by the defendant. And the word "Excelsior" is one in which an exclusive right of user as a trade mark may be obtained; and upon a motion for an injunction to restrain the defendants from selling soap under the name of the "Excelsior White Soft Soap," or any name only colourably different therefrom, Vice-Chancellor Sir W. P. Wood granted an injunction to restrain the Defendants from selling, or advertising, or exposing for sale, any soap under the name of "Excelsior White Soft Soap," or any words so contrived as to represent, or to lead to the belief, that the article sold by the defendants was the plaintiff's article of manufacture (3).

Although a person may have abandoned right to exclusive use of a term—

12. Although a party by dismissing his former bill has abandoned all right to the exclusive use of a term, he is entitled to restrain any person from selling a similar article as the "original" one; thus, where A. (the Plaintiff Dr. J. C. Browne) discovered a

(1) *Bury v. Bedford*, 9 Jur. (N. S.) 956; 10 Jur. (N. S.) 503; 32 L. J. (Ch.) 741; 33 L. J. (Ch.) 465.

(2) *Ib.*

(3) *Braham v. Brustard*, 1 H. & M. 447; 11 W. R. 1061.

medicine to which he gave the name of chlorodyne, invented by himself as a fancy title, and not previously known in the medical profession; and B. advertised for sale a medicine which he called chlorodyne, and sold as B.'s chlorodyne; and A. filed a bill against B., but did not press it to a hearing, and obtained an order dismissing it with costs, and then B. subsequently advertised his medicine as "original chlorodyne," asserting that he was the first inventor; upon a motion for an injunction in a second bill by A. to restrain B. from the use of the term "original chlorodyne," Vice-Chancellor Sir W. P. Wood held, that if he had adduced evidence that any one had been misled by the title into buying B.'s instead of A.'s medicine, he would have been entitled to an injunction (1).

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he is entitled to restrain a person selling a similar article as the "original" one.

13. In *Kinahan v. Bolton* (2), a firm which had adopted the letters "LL" to designate a peculiar quality of whisky sold by them, was held to have acquired an exclusive right to the use of those letters as a trade mark, though they were always preceded by the name of the firm upon the labels issued by them.

An exclusive right to use "LL" as a trade mark, though always preceded by name of firm.

14. In order to prove acquiescence by a firm in the piratical use of their trade mark, knowledge of such use must be proved; and that is not accomplished by the proof of publication of advertisements, which would have been an invasion of the rights of the firm if these advertisements had been issued, not steadily or uniformly, but interchangeably with other advertisements in some respects similar, but not infringing the rights of the firm (3).

15. If an owner of a trade mark, by his bill, asks for an injunction to which he is entitled, together with an account of profits to which he is not entitled, and the defendant offers to submit to a perpetual injunction on each party paying his own costs, and the plaintiff brings the cause on for hearing, the Court, holding both parties in the wrong, will give no costs to either side (4). The Master of the Rolls, in this case, observed that if the defendants had offered to submit to the injunction and to pay the costs, and the plaintiffs had afterwards brought the cause to a hearing, he would have given the defendants their costs subsequent to that offer.

Both parties wrong, no costs on either side. If defendants offer to submit to injunction and pay costs, and plaintiff refuse, defendants entitled to subsequent costs.

(1) *Broune v. Freeman*, 12 W. R. 305.

(2) 15 Ir. Ch. Rep. 75.

(3) *Ib.*

(4) *Moet v. Couston*, 33 Beav. 578; 10 Jur. (N. S.) 1012; 10 L. T. (N. S.)

395.

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No necessary
a specific
trade mark
should be
infringed;
sufficient if
Court satisfied
of a fraudu-
lent intention
of palming
off goods as
plaintiff's—
but in such a
case it is essential
imitation necessarily
calculated to deceive.

No injunction
to restrain
issue of goods
bearing labels
containing
false repre-
sentation, if
such repre-
sentation is
not infringe-
ment of any
right in
plaintiff.
No special
property in
nature of a
trade mark in
words "prize
medal," in
persons to whom
prize medals awarded,
ipso facto of the award.

It is not
necessary
whole of trade
mark should
be imitated.
Where Court
of opinion
mark is likely
to deceive, no
evidence required
of actual deception.

The Court
restrains use
of an arbit-
rary name
applied to a
particular
class of goods,
where the sale
of that class

16. It is not necessary in order to give a right to an injunction that a specific trade mark should be infringed; it is sufficient that the Court should be satisfied that there was on the whole a fraudulent intention of palming off the defendant's goods as those of the plaintiff; but in such a case it is essential that the imitation should be necessarily calculated to deceive; and where it did not appear that any one had been, in fact, deceived, and a material part of the plaintiff's peculiar marks had been omitted, the Court, notwithstanding strong circumstances of suspicion, refused to interfere (1).

17. The Court will not grant an injunction to restrain the issue of goods bearing labels containing a false representation, when such falsehood is not an infringement of any right vested in the plaintiff (2). And the persons to whom prize medals have been awarded by the Commissioners of the International Exhibition, 1862, have not *ipso facto* any special property in the nature of a trade mark in the words "prize medal;" and, therefore, where a person who had not obtained such a medal issued his goods with labels affixed to them bearing the words "Prize medal, 1862," the Court refused to interfere at the instance of a person who had obtained such a medal (3).

persons to whom prize medals awarded, *ipso facto* of the award.

18. It is not necessary in order to maintain a prayer for an injunction that the whole of a trade mark should have been imitated, and where the Court is of opinion that the use of a particular mark is likely to deceive, it will not require evidence of actual deception (4).

evidence required of actual deception.

19. The Court will restrain the use by a third party of an arbitrary name which a plaintiff has invented and applied to a particular class of goods as sold by him, and which has thus become identified with the plaintiff's goods, where the sale of that class of goods is open to the world (5). But where the class of goods is a

(1) *Woolam v. Ratcliff*, 1 H. & M. 1061.

259.

(2) *Batty v. Hill*, 1 H. & M. 264.

(3) *Ib.*

(4) *Braham v. Busturd*, 11 W. R.

(5) *Young v. Macrae*, 9 Jur. (N.S.)

322; *Edelsten v. Edelsten*, 1 De G. J. &

S. 185; 9 Jur. (N. S.) 479; 11 W. R.

328.

patented article, no such protection will be afforded, for the name becomes identified with the goods, not because they are the plaintiff's, but because he alone, as patentee, can make and sell them; and if the goods are the same, but made or manufactured in a totally different way and from a totally different natural source, so that there is no infringement of the patent, a third party may use the name fixed upon by the patentee (1).

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is open to all
the world—
but not
where the
class of goods
is a patented
article.

20. A. having infringed B.'s trade mark on a blistering ointment manufactured by A., it was agreed between them that all claims in respect of such invasion, not only with respect to A., but to include all parties who might have purchased the ointment from him, should be settled and discharged by the payment of a sum of money, and B. undertook to execute a release of all claims and demands in respect of the infringement. Before the agreement A. had sold large quantities of the ointment to different persons, who, after the agreement, sold it with B.'s trade mark, and suits were commenced against them by B. for injunctions; A. thereupon sued B. for a specific performance of the agreement to execute a release, and to restrain B. from proceeding in the suits; but the Court held, that the agreement was confined to sales by A. and all other persons to whom he had sold the ointment prior to the agreement, and did not authorize a sale by the latter after the agreement (2).

21. In *Cartier v. Carlisle* (3) the Master of the Rolls (Lord Romilly) held that a defendant was liable in Equity to account for the profits made by the colourable imitation of a plaintiff's trade mark, though at the time of the user he might have been ignorant of the rights, and of the existence of the plaintiff; and he granted a perpetual injunction to restrain the use by the defendant of the plaintiff's trade mark, and an account of the profits accruing from the use of such trade mark for six years prior to the filing of the bill, although the defendant was not aware that such trade mark was the property of the plaintiff or of any other person. However, this doctrine, so far as regards the account, is contrary to that laid

(1) *Young v. Macrae*, 9 Jur. (N. S.) 322; *Edelsten v. Edelsten*, 11 D. G. J. & S. 185; 9 Jur. (N. S.) 479; 11 W. R. 328.

(2) *Oldham v. James*, 13 Ir. Ch. Rep. 393.

(3) 31 Beav. 292; 8 Jur. (N. S.) 183.

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It is not necessary to prove fraud to entitle to an injunction against using a trade mark, or that defendant's credit is injured, but it is so to entitle to an account.

Loss of profit supports title to relief.

Proof of actual deception not necessary, but

If a decree directs defendant to account for goods sold with particular stamp, defendant is compelled to disclose names of persons to whom he sold such goods—if unable, then to disclose to whom he sold goods which he will not swear were unstamped.

down by Lord Chancellor Westbury in the case of *Edelsten v. Edelsten* (1). At Law the proper remedy is by an action for deceit, and proof of fraud on the part of the defendant is of the essence of that action; but this Court will act on the principle of protecting property alone, and it is not therefore necessary for the injunction to prove fraud (although it is necessary to do so to entitle the plaintiff to an account of profits), or that the credit of the plaintiff was injured by the sale of an inferior article. And an injury by loss of custom is sufficient to support a title to relief, and it is not necessary that proof should be given of persons having been actually deceived in having bought goods with the defendant's mark under the belief that they were of the manufacture of the plaintiff; however, the Court must be satisfied that the resemblance was such as would be likely to cause the one mark to be taken for the other (2).

Court must be satisfied resemblance likely to mislead.

22. Where a decree has been made directing the defendant to account for all goods sold by him with a particular stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods, and if he be unable to give such information precisely, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped (3).

23. A person who has appropriated to himself a particular label, sign, or trade mark, indicating that a certain article is made or sold by him or his authority, and with which label or trade mark the article has become identified, is entitled to the protection of a Court of Equity, which will enjoin any one who attempts to pirate upon the goodwill of his friends or customers by using such label, sign, or trade mark, without his authority; but there must be between the genuine and fictitious marks such general similarity or resemblance of form, colour, symbols, designs, and such identity of words and their arrangement, as to have a direct tendency of misleading buyers who exercise the usual amount of prudence and caution, and there must also be such a distinctive individuality in the mark

(1) 1 De G. J. & S. 185; 9 Jur. (N. S.) 479; 11 W. R. 328; *Young v. Macrae*, 9 Jur. (N. S.) 322; v. pl. 6,

(2) *Ib.*

(3) *Leather Cloth Company v. Hirschfeld*, 1 H. & M. 295.

employed by the counterfeiter as to procure to him the benefit of the deception resulting from the general resemblance between the genuine and counterfeit labels, or trade marks (1).

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24. Where a bill had been filed by an American company for manufacturing edge-tools of a superior description, incorporated by the law of the State of Connecticut in the United States of America, for an injunction to restrain a manufacturer of Birmingham from continuing the fraudulent use of the trade marks and labels of the company on tools made and sold by the defendant, and for an account of the profits made by him from such use; and the manufacturer, by his answer, admitted the use of the trade marks complained of, but by way of rebuttal of the charge of fraud stated, that in so using the trade marks he had only followed a custom prevalent at Birmingham for manufacturers of goods of the kind sold by the company to affix on the goods ordered by merchants a particular trade mark, relying on the respectability of the merchants, when known to them, for the fact that those merchants had authority to act as agents of, or by way of license from, the person entitled to the exclusive use of the trade marks; and that he had been informed that the company themselves had ordered goods to be manufactured at Birmingham with their own trade marks upon them as though they had been manufactured in the United States, for the purpose of sale in foreign countries, and these statements were uncontradicted by the company; Vice-Chancellor Sir J. Stuart, upon motion for a decree, after observing that the plaintiffs insisted upon their right to an account of profits, without any trial at Law upon the question how far their alleged legal right might be affected by the facts stated in the defendant's answer, but that such a course would be improper, citing *Motley v. Downman* (2) in support of that view, ordered that an interim injunction which the defendant had previously submitted to, should be continued for a year, with liberty to the company to bring an action within that time to try their right at Law; and in case of their not proceeding at Law, or not proceeding to trial within that time, then that their bill should stand dismissed with costs, otherwise further consideration of the costs of the

Where an answer, uncontradicted, set up a custom of manufacturers to affix trade marks as directed by the merchant, and that plaintiffs, a foreign company, had ordered goods to be manufactured in England with their own trade mark as manufactured in plaintiff's country—interim injunction continued a year, with liberty for plaintiffs to try their right at Law,—but not doing so bill to be dismissed.

(1) *Colladay v. Baird*, 7 Upp. Can. Law J. 132.

(2) 3 My. & Cr. 1.

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If the manufacturer of an article with a trade mark, at the order of another, hears of a party entitled to it, he can be enjoined, and must pay costs.

suit and all further directions were observed until after such trial (1).

25. Where A. is ordered by B. to manufacture an article and stamp it with a trade mark not B.'s, that alone would lead to a suspicion that some party may exist entitled to it; and A. having caused the article to be manufactured, and admitting having casually heard of the party entitled to use such trade mark, must not only submit to a perpetual injunction, but pay the costs of the suit, though the defendant had admitted the plaintiff's title and no account was asked; however, he had refused to pay the plaintiff's costs (2). And in *Burgess v. Hill* (3), where the defendant innocently used the plaintiff's trade marks, and on being served with the bill he removed the labels, and gave an undertaking not to sell any more, but refused to pay the costs, and the suit was continued to a hearing, and the account of profits, which were very trifling, was waived; Vice-Chancellor Sir R. T. Kindersley held, that the defendant must pay the whole costs of the suit. And where a suit had been instituted to restrain the user of a trade mark and for an account, but no application had been made to the defendant before suit, and he said he would have desisted if he had been applied to, and at the hearing the account was abandoned, but a perpetual injunction was granted; the Master of the Rolls held, that the defendant must pay the costs (4).

26. Where upon the dissolution of a partnership, which had been carried on for a considerable time by John Douglas and others, as stuff merchants, under the style or firm of "John Douglas & Co.," John Douglas had assigned all his shares, rights, and interests in the business, and the goodwill thereof, to his late partners and another, who thereupon proceeded to carry on business under a new style or firm, consisting of their own names, with the addition of the words "late John Douglas & Co.;" upon a bill filed by them John Douglas was restrained from resuming or carrying on business of a stuff merchant at or in the immediate neighbourhood, either alone or in partnership with any other persons whatever, under the style or firm of "John Douglas & Co.," or in

(1) *Collins Company v. Reeves*, 28 7 W. R. 222.

L. J. (Ch.) 56; 4 Jur. (N. S.) 865.

(3) 26 Beav. 244; 5 Jur. (N. S.) 233.

(2) *Collins Company v. Walker*,

(4) *Burgess v. Hately*, 26 Beav. 249.

any other manner holding out that he was carrying on the business of a stuff merchant in continuation of, or in succession to, the business carried on by the late firm of John Douglas & Co.; and the Vice-Chancellor (Sir W. P. Wood) said, that the question to be considered was what is included in the term "goodwill"? and observed that the authorities, he thought, were conclusive upon this point, that the sale of the goodwill of a business, without more, does not imply a contract on the part of the vendor not to set up again a similar business himself; and that he used the expression "similar business" purposely, in order to distinguish the case he was supposing from one where, as here, the vendor seeks to set up again the identical business which he has professed to sell; and that upon a sale of the goodwill of a business the vendor was not precluded from carrying on a precisely similar business, with all the advantages he might be able to acquire from his own industry and labour, and from the regard people might have for him; and that in a place next door, for example, to the very place where the former business was carried on; and that, upon the authorities, it was settled, that if the purchaser wishes to prevent that step from being taken, it is his fault if he does not take care to insert provisions to that effect in the deed; and that the judgment in *Crutwell v. Lye* (1) distinctly admitted that although you may set up a similar business you are not entitled, when you have sold the goodwill of a business, to represent that you are continuing *the identical business*—you are not to say, I am the owner of that which I have sold; for it really came to nothing less than that (2).

27. In *Farina v. Silverlock* (3), Vice-Chancellor Sir W. P. Wood granted a perpetual injunction to restrain a printer from printing or selling labels similar to those used by the plaintiff as his trade mark, notwithstanding the possibility that some labels so printed and sold might be purchased *bonâ fide*, and for the purpose of being applied to articles of the plaintiff's own manufacture, from which his labels had been lost; and as the defendant had insisted on an adverse right after having been made aware that the plaintiff had been defrauded through his agency, he was ordered to pay the costs of all proceedings both at Law and in Equity.

28. Where the plaintiffs made and sold soda-water in their own

(1) 17 Ves. 335. (2) *Churton v. Douglas*, 1 Joh. 174. (3) 4 K. & J. 650.

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bottles, marked in the glass with their own name, and pasted over the corks with reddish labels, bearing a royal crown and their own name, and they charged the bottles and contents in one price per dozen to their customers, and allowed 3s. per dozen for the empty bottles, the bottles only costing them 1s. 6d. per dozen; and the defendant, who had been a customer of theirs to some extent, being asked for a dozen of soda-water by the plaintiffs' agent, sent for that purpose, supplied twelve bottles, seven of which were not stamped in the glass with the plaintiffs' name, and about which no deceit nor mistake could arise, but the remaining five bottles so supplied bore the plaintiffs' name on the glass, and had been originally made and supplied by the plaintiffs, but to whom in particular did not appear, and the labels on all the bottles so sold were similar in colour to the plaintiffs' labels, and had a royal crown, but had not the plaintiffs' name on them, but the water was not the plaintiffs' water; and they, on such purchase, without asking for any explanation, filed a bill for an injunction to restrain the use, or vending by the defendant of the plaintiffs' bottles generally; Vice-Chancellor Sir W. P. Wood dissolved an

No injunction where defendant not shewn to have had an intention to mislead, nor to have in fact misled, the public—but if the public be misled, though unintentionally, the Court will grant injunction.

There is no property in a trade mark (*sed vide post*, pl. 56).

ex parte injunction which they had obtained, with costs, the Court being of opinion, upon the evidence, that the defendant was not shewn either with an intention, or so as in fact to mislead the public(1). But the use of such bottles so as in fact to mislead the public, though unintentionally, would be restrained (2).

29. It is a serious error to allege in a bill to restrain the improper use of a trade mark, that the trade mark complained of is "similar," when it is in fact the same, or *vice versa* (3).

30. A man has no property in a trade mark, but he has a right to prevent anybody else from using it, so as to attract custom which would otherwise flow to himself (4); for though there is no property in a trade mark (5), yet a person who has been in the habit of using a particular mark may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired, by using his mark in order to pass off their goods as his, to his injury; and where the plaintiff, an alien *ami*, manu-

(1) *Welch v. Knott*, 4 K. & J. 747; 4 Jur. (N.S.) 330.

(2) *Ib.*

(3) *Ib.*

(4) *Collins Company v. Brown, Same v. Cohen*, 3 K. & J. 423; 3 Jur. (N.S.) 929.

(5) *Sed vide post*, pl. 56.

factured, in his own country, goods, which he distinguished by a peculiar trade mark, and the goods obtained considerable reputation, both in his own country and in various other foreign countries, and also in some British colonies, but it was not shewn that any of such goods had ever been even introduced or imported into England; and the defendant was in the habit of manufacturing in and selling in this country goods similar in appearance, and with an exact copy of the plaintiff's peculiar trade mark, and some of these imitative articles were sold and used abroad in countries where the plaintiff's goods had obtained a reputation; Vice-Chancellor Sir W. P. Wood held, that the plaintiff was entitled to an injunction restraining the defendant from copying or imitating the trade mark; and, *semble*, a person on whom an injury is fraudulently committed may have a remedy in the Courts of any country where the fraud occurs, and even though he be at the time an alien enemy; and a foreign manufacturer has a remedy by suit in this country for an injunction to restrain the fraudulent appropriation of his trade mark, and for an account of profits against a manufacturer here who has committed a fraud upon him by using his trade mark for the purpose of inducing the public to believe that the goods marked are manufactured by the foreigner; and this relief is founded upon the personal injury caused to the foreigner by the defendant's fraud, and exists, although he resides and carries on his business in another country, and has no establishment here, and does not even sell, or usually sell, the goods on which such trade mark is affixed in this country (1).

31. A manufacturer who has adopted a trade mark to designate some particular article as made by him, has a right to the assistance of a Court of Equity to prevent any one from so using the same, or any similar mark, as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied; but where a manufacturer of Eau de Cologne claimed a trade mark in the labels of his bottles in a certain form, and had obtained an interlocutory injunction from Vice-Chancellor Sir W. P. Wood (2) against a

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An alien *ami* is entitled to restrain imitation of trade mark of goods manufactured in his own country—and though his goods not imported here. *Semble*, if he were an alien enemy he would also be entitled.

(1) *Ollins Company v. Brown*, Jur. (N. S.) 865.

Same v. Cohen, 3 K. & J. 423; 3 Jur.

(N. S.) 929; *et v. Collins v. Reeves*, 4

(2) *Furina v. Silverlock*, 1 K. & J.

509.

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A person knowingly printing labels in imitation of a trade mark, and selling them to any one, is a party to a fraud, and will be restrained.

In colourable imitations of trade marks, Court considers whether public would probably be deceived, not manufacturers.

printer, who printed and sold similar labels to many persons, but it was shewn that in many instances labels the same as, or similar to it, might be sold for a legitimate purpose; Lord Chancellor Cranworth dissolved the injunction (giving the plaintiff liberty to bring his action), on the ground, that as many persons were in the habit of retailing the plaintiff's Eau de Cologne, and therefore might rightly use the label, it was not to be assumed that the printer sold the labels for an illegal purpose (1); though, according to the Vice-Chancellor in this case (2), the ground of the equity is, that the defendant by knowingly printing labels in imitation of the plaintiff's trade mark, and selling them to any one who asked for them, was supplying the means of committing, and was thus a party to, frauds which Courts of Equity would interfere to stop at their source. However, the Vice-Chancellor said, in the same case (3), that he thought that in the observations of the Lord Chancellor, cited above, the Court was not pronouncing a judgment on what was to be done in a case like the present, but was giving a reason for directing the question to stand over until after the trial; and that he thought the cause was not ripe for decision in this Court until an action had been tried; that the action had been tried, and a verdict found for the plaintiff, and made a decree for a perpetual injunction in the same terms as the above-mentioned order for an interlocutory one.

32. There is no copyright in a trade mark (4).

33. In cases of alleged colourable imitations of trade marks the Court has not to consider whether manufacturers could distinguish between the articles, but whether the public would probably be deceived by the alleged spurious imitation (5).

34. Where the plaintiffs, who represented T., the original patentees of an article, the patent for the manufacture of which had expired, continued to use labels on their goods printed from the original blocks belonging to the patentees, on which labels the goods were described as patented, and the defendants adopted and

(1) *Farina v. Silverlock*, 6 De G. M. & G. 214.

(2) *Farina v. Silverlock*, 1 K. & J. 509.

(3) 4 K. & J. 650.

(4) *Farina v. Silverlock*, 6 De G. M. & G. 214.

(5) *Shrimpton v. Laight*, 18 Beav. 164.

issued labels closely resembling those of the plaintiffs, although the description of the plaintiffs' goods as being patented had ceased to be strictly true; the Court granted an injunction restraining the defendants from using, being a palpable imitation, labels bearing an inscription appearing to designate the goods contained therein as being manufactured by the plaintiffs; and the Court held, that the plaintiffs were not disentitled to sue by reason that the representations on their labels were no longer accurate, although the goods (that is to say pins) were not now protected by patent, nor manufactured strictly according to the patent, nor exclusively or at all by the patentees, who had long since retired; but that the defendant was not to be precluded altogether from representing that his pins were manufactured according to T.'s patent (now expired); but that he was not to do so in a manner liable to mislead (1).

But defendant entitled to represent his article as manufactured according to the patent.

35. Where, in 1847, Joseph R. & Sons had obtained an injunction to restrain N. and William R. from using the trade mark "J. R. & Sons," and soon afterwards W. R. entered into partnership with his father John R., and with a brother, and the three used the trade mark "J. R. & Sons," with a colourable addition; upon the plaintiff moving, in 1853, to commit W. R., and denying notice of the breach of the injunction before 1852, the Court held, that they were entitled to the order; and Lord Justice Sir G. J. Turner said, that on the question of acquiescence he thought that in a case of this description, where there had been an injunction granted by this Court, there must, in order to deprive the party who had obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against as would entitle him to file a bill against others for doing that act; and said that the party enjoined must, he thought, shew such an acquiescence as would be sufficient to create a new right in him; and it was also held that the plaintiffs might move to commit W. R. without bringing his partners before the Court (2).

36. Where a person is selling an article in his own name, fraud

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The Court will restrain imitation of label appearing to designate goods manufactured by plaintiffs—the representatives of patentees of an expired patent—and this though the plaintiffs' labels were not strictly true in using the word "patented."

On an injunction obtained to restrain "N. & William R." using the trade mark "J. R. & Sons;" the use of the mark "J. R. & Sons" by W. R., one of the original firm of "N & William R.," who had, with his father, John R., and a brother, formed a new firm, was held a contempt by W. R.

A person selling an

(1) *Edleston v. Vick*, 11 Harc, 78; 18 Jur. 7. (2) *Rodgers v. Nowill*, 3 De G. M. & G. 614.

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article in his own name, not restrained by a person who has used same name, unless fraud.

If strong resemblance in matter, colour, and arrangement, Court presumes it is intentional, and to mislead. The Court considers whether differences are natural from necessity, or colourable and intended to deceive.

Where an article not patented was represented as such, and four months allowed to pass without taking steps, an interlocutory injunction refused, but liberty to bring action, and if legal right proved,

must be shewn to constitute a case for restraining him from so doing, on the ground that the name is one in which another has long been selling a similar article; thus where the manufacturer of an article sells it under his own name, and the article attains great celebrity in the market under that name, the manufacturer does not thereby acquire such an exclusive right in the use of the name or title under which the article has been sold as to prevent the use of it, without fraud, by another person having the same name, in the sale of a similar article manufactured by himself; and therefore, where a father had for many years exclusively sold a sauce under the title of "Burgess's Essence of Anchovies," the Court would not restrain his son from selling a similar article under that name, no fraud being proved (1). The Court also held, that delay, from October to March, in appealing from the refusal of a motion for an interlocutory injunction was fatal to the appeal (2).

37. Where there is a strong resemblance in matter, colour, and arrangement, the Court will presume that it is not fortuitous, but that it was intentional, with a view to mislead purchasers (3); and in an alleged infringement of a right to trade marks, the Court must ascertain whether the resemblances and the differences are such as naturally arise from the necessity of the case, and whether, on the other hand, the differences are simply colourable, and the resemblances such as are obviously intended to deceive the purchaser (4).

38. Where the plaintiff's father, to whose business the plaintiff succeeded, had contrived a grate, which he termed "Flavel's Patent Kitchener," but no patent was ever taken out, and the defendant H., formerly a servant of F., obtained surreptitiously lists of his customers, and copies of his plans, &c., and used them in constructing an exactly similar article, which he sold under the name of "F.'s Patent Kitchener;" but there was no proof that he represented the articles so sold by him as having been actually made by F., and the plaintiff suffered four months to elapse without taking any steps; Vice-Chancellor Sir W. P. Wood held, that

(1) *Burgess v. Burgess*, 3 De G. M. & G. 896; 17 Jur. 292; 22 L. J. (Ch.)

675.

(2) *Ib.*

(3) *Edleston v. Vick*, 11 Hare, 78; 18 Jur. 7.

(4) *Taylor v. Taylor*, 23 L. J. (Ch.)

225.

as the misrepresentation as to the article being patent was so far fraudulent, and looking also to the lapse of time, the Court would not interfere summarily by an injunction in the first instance to prevent the defendant using the plaintiff's name in such manner; and therefore the bill was retained six months with liberty to bring an action in the meantime, the Court not deciding the question whether the plaintiff had or had not a legal remedy; but if he should prove to have a legal right, the Court said that he would then be entitled to its aid to enforce it (1). In *Morgan v. M'Adams* (2), where the plaintiffs purchased from a firm established in the United States, knowledge of a secret mode of making crucibles, which had acquired a reputation in America as "Patent Plumbago Crucibles," although the process never had been patented, Vice-Chancellor Sir W. P. Wood held, that they could not maintain a bill to restrain others from pirating this designation, and dismissed the bill with costs.

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an injunction
would be
granted.

39. In granting injunctions to prevent the infringement of trade marks, the Court exercises its jurisdiction in aid of Courts of Law, i.e., where an action could be maintained in a Court of Law; but it does not exercise an independent jurisdiction (3).

The jurisdiction of this Court to restrain infringement of trade mark is in aid of a common law right of action.

40. Where the plaintiff, Thomas Holloway, sold a medicine as "Holloway's Pills," and the defendant, Henry Holloway, commenced selling Pills as "H. Holloway's Pills," but in boxes, &c., similar to the plaintiff's, and with a view of passing off his pills as the plaintiff's, he was restrained by injunction (4).

The sale of pills in imitative boxes as "H. Holloway's Pills" restrained by prior seller of pills as "Holloway's Pills."

41. The boxes of tin plates made at particular works at Carmarthen were for a long series of years branded with the mark "M. C." S., a lessee of those works, who had used that mark, subsequently removed his manufactory to other works at a distance of forty miles, and there used the same mark; the Carmarthen works were for some years unoccupied, but afterwards D. and others as co-partners, having taken a lease of them, carried them on, and branded their boxes with the mark "M. C.," and styled

(1) *Flavell v. Harrison*, 10 Hare, 467; 17 Jur. 368; 22 L. J. (Ch.) 866.

(2) 36 L. J. (Ch.) 228; 15 L. T. (N. S.) 348.

(3) *Foot v. Lea*, 13 Ir. Eq. Rep. 484; *Motley v. Downman*, 3 My. & Cr. 1.

(4) *Holloway v. Holloway*, 13 Beav. 209.

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The Court, in exercising the jurisdiction of restraining infringement of trade marks, is exercising jurisdiction over legal rights, and, except in a very strong case, as a general rule puts the party upon asserting his right at Law. The Court only acts in aid of, and is only ancillary to, the legal right.

The assumption of a similar name, but without probability of doing injury, not sufficient for an injunction.

No injunction to restrain sale of quack medicine as that of an eminent physician, as the Court has no jurisdiction to restrain a libel.

themselves "The 'M. C.' Tin Plate Company;" S. then obtained an injunction to restrain D. and his partners from using the mark "M. C.," or the designation of the "M. C. Tin Plate Company;" but, upon appeal, Lord Chancellor Cottenham dissolved the injunction, with liberty to S. to bring an action, the defendants not to be prejudiced in the meantime, with liberty for both parties to apply, and the costs reserved. The Lord Chancellor said, that the Court, when it interferes in cases of this sort, is exercising a jurisdiction over legal rights; and that although, sometimes, in a very strong case, it interferes in the first instance by injunction, yet, in a general way, it puts the party upon asserting his right by trying it in an action at law. If it does not do that, it permits the plaintiff, notwithstanding the suit in Equity, to bring an action, and that in both cases the Court is only acting in aid of, and is only ancillary to, the legal right; and, further, that he could hardly conceive a case in which the Court would at once interfere by injunction, and prevent a defendant from disputing the plaintiff's legal title, and that the present order appealed from interposed the injunction, and did not put the parties in a situation to try the question at Law (1). And an injunction to restrain a defendant from using the particular style or title adopted by the plaintiff will not be granted, if the Court entertains the slightest doubt of the plaintiff's right to sustain his title at Law (2).

42. Where one company assumed a name somewhat similar to the name of another company, but it did not appear that the first company was likely to suffer any injury thereby, the Court refused to grant an injunction, leaving the plaintiffs to bring their action at law (3).

43. In *Clark v. Freeman* (4), the Court refused an injunction to prevent a chemist from selling a quack medicine, under a false and colourable representation that it was a medicine of the plaintiff's, an eminent physician. The Master of the Rolls (Lord Langdale)

(1) *Molloy v. Downman*, 3 My. & Cr. 1; *Foot v. Lea*, 13 Ir Eq. Rep. 484.

(2) *Purcer v. Brain*, 17 L. J. (N. S.) Ch. 141.

(3) *London and Provincial Life Assurance Society v. London and Provincial Joint Stock Life Insurance Company*, 11 Jur. 938.

(4) 11 Beav. 112.

said that he thought the granting the injunction in this case would imply that the Court had jurisdiction to stay the publication of a libel, and that he could not think it had.

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44. Where the plaintiff had invented and sold a medicine under his own name, and the defendant had also made and sold a similar medicine, and on his labels had the plaintiff's name and certain certificates given of the efficacy of the plaintiff's medicine, in such an ingenious manner as *prima facie*, though not in fact, to appropriate and apply them to his own medicine; the Court held, that although there were other differences in the mode of selling, the proceeding was wrongful, and the defendant was restrained by injunction (1).

45. Where a blacking manufactory had long been carried on under the firm of Day & Martin, at 97, High Holborn, and the executors of the survivor continued the business under the same name, and a person of the name of Day, having obtained the authority of one Martin to use his name, set up the same trade at 90½, Holborn Hill, in bottles and with labels having a general resemblance to those of the original firm; the Court restrained by injunction the defendant from selling, exposing for sale, or procuring to be sold, any composition described as, or purporting to be, blacking manufactured by Day & Martin, in bottles having affixed such labels as in the bill mentioned, or any other labels as, by colourable imitation or otherwise, to represent the blacking sold by the defendant to be the same composition or blacking manufactured and sold by J. W. (the manager) for the benefit of the estate of C. Day, the testator, and from using trade cards with the same object. And the Master of the Rolls (Lord Langdale) observed that it had been very correctly said that the principle in these cases was this: that no man had a right to sell his own goods as the goods of another, and that you might express the same principle in a different form, and say, that no man had a right to dress himself in colours, or adopt and bear symbols, to which he had no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he was that other person, or that he was connected with and selling the manufacture of such other person, while he was really

No man has the right to sell his own goods as the goods of another—No man has a right to adopt symbols to which he has no exclusive right, and thereby to personate another, to mislead the public.

Injunction refused until title established, where plaintiff had used a considerable degree of misrepresentation in statements to the public.

(1) *Franks v Weaver*, 10 Beav. 297.

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The right to protection does not depend on any exclusive right to a particular name or form of words, but to be protected against fraud.

Equity protects trade marks on the ground that a party will not be allowed to sell his own goods as the goods of another; nor will he be allowed to use *indicia* by which he may pass off his own goods as the manufacture of another. But if plaintiff appears to have been guilty of misrepresentation to the public, no injunction in first instance until legal right established.

selling his own, and that it was perfectly manifest that to do these things was to commit a fraud, and a very gross fraud; and that he had stated on a former occasion that, in his opinion, the right which any person might have to the protection of the Court did not depend upon any exclusive right which he might be supposed to have to a particular name, or to a particular form of words: that his right was to be protected against fraud, and fraud might be practised against him by means of a name, though the person practising it might have a perfect right to use that name, provided he did not accompany the use of it with such other circumstances as to effect a fraud upon others: that it was perfectly manifest that two things were required for the accomplishment of a fraud such as was there contemplated; first, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and secondly, a sufficiently distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance was calculated to produce, and that to have a copy of the thing would not do, for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which was improperly sought to be sold: that for the accomplishment of such a fraud it was necessary in the first instance to mislead the public, and in the next place, to secure a benefit to the party practising the deception by preserving his own individuality (1). And in *Perry v Truefitt* (2) it is also laid down that the ground on which a Court of Equity protects trade marks is, that it will not permit a party to sell his own goods as the goods of another; and that a party will not therefore be allowed to use names, marks, letters, or other *indicia*, by which he may pass off his own goods to purchasers as the manufacture of another person. But if a plaintiff coming for an injunction in such a case appears to have been guilty of misrepresentation to the public, a Court of Equity will not interfere in the first instance, and give its assistance in aid of a legal right; But if plaintiff appears to have been guilty of misrepresentation to the public, no injunction in first instance until legal right established.

(1) *Croft v. Day*, 7 Beav. 84.

(2) 6 Beav. 66.

and the case was ordered to stand over, with liberty to bring an action (1). In *Gout v. Aleploglu* (2), the Court granted an injunction to restrain the making and sending to Turkey watches having the plaintiff's name, or the word "*Ressendede*" (which signifies "warranted" or "approved") engraved thereon in Turkish characters, in imitation of the plaintiff's watches. And in *Day v. Binning* (3), the Court granted an injunction against imitating a blacking label, though the difference appeared on a careful reading. In *Knott v. Morgan* (4), the Court granted an injunction to restrain a defendant from running an omnibus having upon it such names, words, and devices, as to form a colourable imitation of the words, names, and devices on the omnibuses of the plaintiff.

Imitation of blacking label restrained, though difference appeared on careful reading. Injunction granted against running an omnibus with words, &c., forming a colourable imitation of words, &c., on plaintiff's omnibuses.

46. In *Perry v. Truefitt* (5) Lord Langdale said, that he owned that it did not seem to him that a man could acquire a property merely in a name or mark.

47. Where the plaintiff had used a considerable degree of misrepresentation in statements made to the public respecting the mode of procuring and making up a new description of tea, called "Howqua's Mixture," the Court refused an injunction to restrain the defendant from selling tea under the name employed by the plaintiff, and in a particular kind of package which the plaintiff had introduced, until the plaintiff had established his title in a Court of Common Law (6).

48. Where A., the inventor of a medicine, employed B., a foreigner residing abroad, to manufacture it for him there, and sold it in England for his own sole profit, and a label and seal denoting that the medicine was manufactured by B., and sold by A., were affixed to each of the bottles in which it was sold, and the defendants imitated the labels and seals, a demurrer was allowed to a bill by A. and B. to restrain the imitation, and for an account of the sales of the spurious labels and seals. The Court observed that the plaintiffs did not shew that they were entitled to an account from the defendants; for that it could not understand from the bill that Pelletier (B.) had any interest in the labels and seals,

(1) *Perry v. Truefitt*, 6 Beav. 66.

(2) 6 Beav. 69, n.

(3) C. P. C. 489.

(4) 2 Keen, 213.

(5) 6 Beav. 73.

(6) *Pidding v. How*, 8 Sim. 477; *et v. Perry v. Truefitt*, pl. 45.

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and that the circumstance that he was the inventor of the seals would not justify the Court in interposing in his behalf, for he was a foreigner; the Court said that it did not protect the copyright of a foreigner, and that it appeared, therefore, that Pelletier was not entitled to the account; that the injunction was ancillary to the account; and that the parties who asked joint relief were not entitled to joint relief; therefore on that ground the demurrer must be allowed (1).

49. Where A. and B. filed their bill alleging a right to a trade mark in the word "Ethiopian" upon black cotton stockings, acquired by A. and a former partner deceased, praying an injunction and account of profits, and the defendants denied plaintiffs' right to the mark as a trade mark, stating that other parties used the word prior to A. and his partner, but admitted that they (the defendants) had copied the mark from the plaintiffs' stockings, but denied any fraudulent attempt in so doing; though the evidence as to the plaintiffs' right to the mark as a trade mark was very unsatisfactory, yet the Court held (refusing a motion to dissolve an injunction), that the defendants having made so complete a copy of the plaintiffs' mark, the difference being only nominal, must be taken to have done so with an intent to gain an advantage to which they were not entitled; and also, that although the personal representative of A.'s deceased partner might have a right to participate in the property (if any) of the mark, A. had such an interest as to entitle him to file the bill (2).

50. When a partnership is dissolved each partner is entitled, in the absence of express agreement, to carry on business in the name of the old firm (3).

51. Charles I. having granted a charter to the Cardmakers' Company to use the Mogul stamp on cards, the plaintiff, suggesting a sole right to the stamp, as having appropriated it to himself conformably to the charter, moved for an injunction to restrain the defendant; but Lord Chancellor Hardwicke refused the injunction, observing that he thought the intention of the charter

Though evidence of right to a mark as a trade mark very unsatisfactory, yet defendants, having made so complete a copy, must be taken to have intended to gain an advantage to which they were not entitled.

Upon dissolution of partnership, each partner may carry on business in name of old firm.

(1) *Delondre v. Shaw*, 2 Sim. 237. of trade marks, and the above was not
But see pl. 30, *ante*, that protection is a case of copyright, but of trade mark.
given to foreigners against infringement (2) *Hine v. Lart*, 10 Jur. 106.

(3) *Banks v. Gibson*, 11 Jur. (N. S.) 680; 34 L. J. (Ch) 591.

was illegal, except the clauses establishing the corporation, and giving them power to make by-laws, and said that he knew no instance of granting an injunction in Chancery to restrain one trader from using the same mark with another, and that it was not the single act of making use of the mark that was sufficient to maintain an action at law, but doing it with a fraudulent design to put off bad cloths, or to draw away customers; and said that the Attorney-General had mentioned a case in Poph. 151, where an action at law was brought by a clothworker against another of the same trade for using the same mark, and judgment was given that such an action would lie; the Lord Chancellor said, that there must be the fraudulent design above mentioned, and that the objection of the defendant taking away the plaintiffs' customers by using the same mark (the Mogul stamp on his cards), was of no more weight than if one innkeeper should set up the same sign as another; and that the Court, however, would never establish a right claimed under a charter only from the Crown, unless the right had been first tried at Law (1). But if, without any intention to defraud, another person uses a trade mark, where a firm has for a considerable time carried on their trade using a distinctive mark on their goods, the Court will interfere to restrain him (2).

52. Where wine marked with a counterfeit of the plaintiff's brand had been imported into this country, and A. had made *bonâ fide* advances on the security of the dock warrants; an injunction having been granted to restrain the dock company from parting with it, the Court, on the application of A., ordered the wine to be delivered to him on the counterfeit brand being removed, but made A. pay the costs of the application; and also held, that the priority of charges on the wine was, first, the expenses of the dock company; secondly, A.'s claim; and thirdly, the plaintiff's costs of suit (3).

Where dock company restrained parting with wine with counterfeit brand, the wine was ordered to be delivered to creditor on security of warrants on brand being removed. Priorities of charges.

53. The Master of the Rolls (Sir J. Romilly) refused an application by the "Colonial Life Assurance Company," for an injunction to restrain another company (lately established) from using the

There can be no monopoly of the word "Colonial,"

(1) *Blanchard v. Hill*, 2 Atk. 484, 3rd Ed.; *et v. Poph.* 144.

(2) *Colonial Life Assurance Company v. Home and Colonial Assurance*

Company, Limited, 33 Beav. 548; *Milington v. Fox*, 3 My. & Cr. 338.

(3) *Ponsardin v. Peto, Uzielli, Ex parte*, 33 Beav. 642.

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nor of the
word
"Home;"
they are not
symbols.

style of "the Home and Colonial Assurance Company (Limited);" observing that the object of the application was really to obtain the monopoly of the use of the word "Colonial," and said that if a company which did colonial business could not call itself "Colonial," it was obvious that under a species of assertion that the word "Colonial" was symbolical, the plaintiffs might prevent every other person using it as descriptive of his trade; that it was obvious that such a claim could not be maintained, and that it would establish a monopoly of the use of the words "Home" and "Colonial," and that such a contention had never been advanced before (1).

A wharfinger
with notice
that wine
with false
brand is
deposited at
his dock, and
of intention
to apply for
injunction, is
justified in
Equity in
refusing to
deliver wine
to holder of
dock warrants.

54. Where a wharfinger received notice that a quantity of wine deposited at his wharf was branded with a fraudulent imitation of a trade mark of the "Veuve Cliquot Champagne," and that the owner of the trade mark was about to apply to the Court of Chancery for an injunction to prevent the sale of the goods, and after the injunction had been granted in a suit of *Ponsardin v. Stear* (2), but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the holder of the dock warrants, who had advanced money on them; the Master of the Rolls (Sir J. Romilly) held, that he was justified in Equity in such refusal, and restrained the owner of the goods from suing him at Law for a wrongful conversion of the goods; and this decision was affirmed by the Lords Justices (3).

Where a
trade mark
contained
statements,
which, though
true as
regarded
original
adopter, were
calculated to
deceive the public
when used by
assignee, assignee
not entitled to protection.

55. Where a trade mark contains an emblem, with such a collocation of words as amounts to an advertisement of the character and quality of the goods, and contains statements which, though true as regards the original adopter of the trade mark, are calculated to deceive the public when used by his assignee, the assignee is not entitled to protection in the use of such trade mark (4). And

(1) *Colonial Life Assurance Company v. Home and Colonial Assurance Company, Limited*, 33 Beav. 548.

(2) *Et v. Ponsardin v. Peto*, 33 Beav. 642.

(3) *Hunt v. Maniere*, 34 Beav. 157; 13 W. R. 212, 363.

(4) *Leather Cloth Co., Limited, v.*

American Leather Cloth Co., Limited, 11 H. L. C. 523 (affirming a decision of the Lord Chancellor, reversing a decision of Vice-Chancellor Sir W. P. Wood); 11 Jur. (N. S.) 513; 35 L. J. (Ch.) 53; 33 L. J. (Ch.) 199; 1 H. & M. 271; 13 W. R. 873.

where an advertisement or trade mark states that which is not true, it cannot be made the subject of protection by the Court of Chancery (1). But where persons of the name of Crockett manufactured leather-cloth, and put on it a stamp describing it as manufactured by them at New Jersey (U.S.) and West Ham, Essex, and as being patented, and being tanned; and a company bought their manufactured articles, their materials for manufacture, goodwill, and premises at West Ham, and their trade marks; *semble*, that on such a purchase the continued use by the purchaser of Crockett's original label was not a fraud on their part; and if the use of it had been infringed, it might have been protected (2); Lord Cranworth (in the House of Lords) observing that the question in every such case must be, whether the purchaser of a manufactory using a trade mark in continuing the use of the original trade mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark, and that in such a case he saw nothing to make it improper for the purchaser to use the old trade mark, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory which he had purchased. But where, in a stamp used by the defendant, the form of the printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiff's that any person with reasonable care and observation must see the difference, and could not be misled into taking the one for the other, the House of Lords held, that there had been no infringement (3).

An advertisement or trade mark stating that which is untrue, not entitled to protection.

56. Lord Cranworth observed in the above case that if the word "property" is aptly used with reference to "copyright," he saw no reason for doubting that it might with equal propriety be applied to trade marks, and that the right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where, by whom, or at what manufactory the article to which it is affixed was made; and treating it as property, or as an

(1) *Leather Cloth Co., Limited, v. American Leather Cloth Co., Limited*,
11 H. L. C. 523.

(2) *Ib.*

(3) *Ib.*

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accessory of property, Lord Cranworth thought that a trade mark might be sold and transferred upon a sale and transfer of the manufactory of the goods on which the trade mark has been used to be fixed, and might be lawfully used by the purchaser (1); and that where a company purchased all the property, utensils, goodwill of business, and trade marks of a manufacturer, this purchase would authorize the company, really carrying on business at the same place, to continue the use of the manufacturer's name and marks, so as to be protected therein against the infringement of the same (2).

The use of a trade mark by new partners or successors of original adopters is not a fraud on the public.

57. A trader may mark his own manufacture either by his name, or by using any symbol or emblem; and if such symbol or emblem comes by use to be recognised in trade as the mark of the goods of such trader, no other trader has a right to stamp it upon his goods of a similar description; and as the usage of trade does not confine the name of a firm to the original partners only, but extends it to subsequent partners and transferees, the use of the trade mark by the new partners or successors of the original adopters is no fraud on the public, but only a statement that the goods are the goods of the firm whose trade mark they bear. If, however, the trade mark contains statements materially affecting the value of the goods, such statements must be judged as if made in separate labels or advertisements, the test being, whether they are material misstatements, and calculated to deceive the public (3): *per* Lord Kingsdown.

If the goods of a trader derive their increased value from personal skill, &c., of adopter, he cannot give any other person the right to affix his name or mark upon their goods.

58. Although a trader may have a property in a trade mark, giving him a right to exclude all others from using it, if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he cannot give any other person the right to affix his name or mark upon their goods, for the effect thereof would be to give them the right to practise a fraud upon the public (4).

Representations on a shop front to

59. Representations contained on the blinds and brasses of a shop-front, calculated to induce the public to believe that the

(1) *Leather Cloth Co., Limited, v. American Leather Cloth Co., Limited*, 11 H. L. C. 523.

(2) *Ib.*

(3) *Ib.*

(4) *Ib.*

owner is connected in business with a firm of established reputation, will be considered upon the same principles as govern rights in trade marks (1). Therefore, where a tradesman (the defendant), in addition to his own name upon his shop-front, placed upon his sunblind and upon his brass plate the words "from Thresher & Glenny" (in whose employment he had been), the word "from" being much smaller than the words "Thresher & Glenny;" the Court, being of opinion that what the defendant was doing was calculated to mislead the unwary, the heedless, or the incautious portion of the public (2), and there being evidence that persons had been actually misled, granted an injunction restraining the defendant from using the name of the firm "T. & G." about his shop in such a way as to mislead the public into the belief that his shop was the shop of "T. & G.," or that their business was carried on there (3). But before the Court will interfere to prevent one trader from making fraudulent use of the name of another, it requires to be satisfied not only that the course taken by the defendant is calculated to deceive the public, but that representation has been made to him by the plaintiff that it will have that effect (4).

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induce public to believe owner connected with a firm of established reputation, restrained. Simulations calculated to deceive the unwary, heedless, or incautious, restrained.

60. Where a defendant sold tobacco-pipes packed in boxes or cases upon which were labels or descriptions of a similar character to those of the plaintiff, using the plaintiff's name as being the real manufacturer, the defendant having a person in his employ of that name; Vice-Chancellor Sir W. P. Wood held, that such colourable imitation and use of the labels and descriptions could be restrained by injunction (5). In *Barnett v. Leuchars* (6) the defendant was restrained from selling or exposing for sale fireworks, not manufactured or sold by the plaintiff, in boxes bearing the plaintiff's labels. In *Southorn v. Reynolds* (7) two persons, brothers, whose father had originated the manufacture of pipes, and designated them as "Southorn's Brosely Pipes," on the death of their father, manufactured at Brosely, but

Use of labels, colourable imitations, placed on boxes, restrained.

One of two brothers may file a bill to restrain infringement of deceased father's trade mark.

(1) *Glenny v. Smith*, 2 Dr. & Sm. 476.

(4) *Williams v. Osborne*, 13 L. T. (N. S.) 498.

(2) As to this point, see pl. 63.

(5) *Southorn v. Reynolds*, 12 L. T. (N. S.) 575.

(3) *Ib.*

(6) 14 W. R. 166.

(7) *Supra.*

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Injunction is granted to restrain infringement of trade mark, although the *scienter* is not proved, but no account of profits.

The Court will not assume that plaintiff would have sold all the articles sold by defendant marked with plaintiff's trade mark; damage must be proved.

at separate establishments, and for their separate benefit, pipes of a like character, and one of the brothers instituted a suit to restrain the use of the trade mark, the other declining to join in such suit; Vice-Chancellor Sir W. P. Wood held, that the one brother might alone file a bill for an injunction and account.

61. In *Harrison v. Taylor* (1) the Court granted an injunction to restrain the use of the plaintiff's trade mark by the defendant, though the *scienter* was not proved; but refused an account of profits, on the ground of delay by the plaintiff in commencing the suit. However, in *Moet v. Couston* (2), it was held, that a person innocently selling goods bearing the spurious trade mark of another person is not in Equity liable to account for the profits made thereby, but that the owner of the trade mark is entitled to an injunction.

62. Where the plaintiffs had obtained a decree restraining the defendants from the use of a trade mark in sales of cloth, and directing an inquiry whether the plaintiffs had sustained any and what damage, and the plaintiffs did not prove any direct damage, but, in the absence of evidence to what extent the defendants had used the trade marks, they claimed damages equal to the profits made by the defendants on all their sales of cloth; Vice-Chancellor Sir W. P. Wood held, that they had failed to prove any damage. The Vice-Chancellor said that the plaintiffs had not proved that they had sold a yard less cloth since the acts of the defendants, or lost one customer by them, but they asked the Court to assume that they would have sold all the cloth which the defendant had sold marked with this trade mark; that the Court, however, could not make this assumption, and that the authorities were to the same effect; that in *Blofeld v. Payne* (3) nothing was proved but the fact of fraud, and the jury gave to the plaintiff one farthing damages; so it was here; and as the Court did not award nominal damages, His Honour declared that the plaintiffs had sustained no damage by the acts of the defendants, and ordered that the costs of the application (a summons adjourned from

(1) 11 Jur. (N. S.) 408.

(2) 33 Beav. 578; 10 Jur. (N. S.) 1012.

(3) 4 B. & Ad. 410.

Chambers, to proceed with an inquiry as to damages) should be borne by the plaintiffs (1).

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63. To entitle a trader to relief against an illegal use of his trade mark, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; but the degree of resemblance must be such that ordinary purchasers, proceeding with ordinary caution (2), are likely to be misled (3); and where the proprietors of a long-established weekly comic periodical called 'Punch' moved to restrain the publication of 'Punch and Judy,' a rival periodical of like character, and of the same size as, and of somewhat similar appearance to, 'Punch,' but with a somewhat different illustration on the cover, and sold at a lower price, and another well-known comic periodical was published weekly under the name of 'Judy;' Vice-Chancellor Sir R. Malins held, that the adoption of the title 'Punch and Judy' was no infringement of the plaintiffs' right to use and property in the name 'Punch,' on the ground that persons of ordinary intelligence were not likely to be misled into purchasing the defendant's publication by mistake for that of the plaintiffs, and refused an injunction (4); and the actual physical resemblance of the two marks is not the sole question for the Court, for if the plaintiff's goods have, from his trade mark, become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same name in the market is as much a violation of the plaintiff's rights as the actual copy of his mark; and although the defendant may have some title to the use of a name or mark, he will not be justified in adopting it, if the probable effect of his so doing is to lead the public to suppose that in purchasing his goods they are purchasing those of the plaintiff (5).

To entitle to relief, resemblance of trade mark must be such as likely to mislead ordinary persons with ordinary caution.

Actual physical resemblance not sole question, if it will cause defendant's goods to bear same name in market as plaintiff's, and lead public to believe they are purchasing plaintiff's goods—that entitles to injunction.

64. The name of a manufacturer, or a system of numbers adopted and used by him in order to designate goods of his make, may be the subject of the same protection in Equity as an ordinary

The name of a manufacturer, or a system of numbers to designate goods—may be protected.

- (1) *Leather Cloth Company v. Hirschfield*, 14 W. R. 78; 13 L. T. (N. S.) 427. 192; 12 Jur. (N. S.) 215. (4) *Bradbury v. Beeton*, 39 L. J. (Ch.) 57; 18 W. R. 33; 21 L. T. (N. S.) 323.
- (2) As to this point, see pl. 59. (5) *Ib.*
- (3) *Seizo v. Provezende*, L. R. 1 Ch.

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trade mark (1). But where, A. being a thread manufacturer of repute, B. bought in the market thread, wound on spools, not made by A., of inferior quality, and cheaper than A.'s, and not bearing his name, but marked with the name of a firm of winders of thread who were known to be accustomed to purchase of A. thread in the hank for the purpose of winding, and selling it when wound, and B. sold the goods to a wholesale customer, with the assurance (given, as he said, without knowledge of any misrepresentation) that they were of A.'s make, and invoiced them to the customer under the description of certain numbers, which A. had adopted and exclusively used in order to designate his particular manufacture, and the customer attached A.'s name to the spools of thread, and retailed it to the public as of A.'s make; Vice-Chancellor Sir W. P. Wood held, that there was not such a degree of wilful misrepresentation on the part of B. as would justify the Court in granting an injunction, and the bill was dismissed, but without costs (2).

The use of a crest may establish a trade mark;

65. A trader may establish a trade mark by the use of a crest, and anything which amounts to an imitation of the crest as a trade mark would be restrained by the Court. But the use of a different crest by another trader, if not accompanied by other *indicia* to make it a colourable imitation of the trade mark of the plaintiff,

and the use of a crest restrained, though defendant set up (but without sufficient proof) that it was his family crest.

will not be restrained (3). And in *Standish v. Whitwell* (4), Vice-Chancellor Sir W. P. Wood granted an injunction to restrain the use of a trade mark, though the defendant alleged that it was his family crest, and had been so for many generations, but there was no registry at the Heralds' College of the alleged crest (an eagle) as being that of the defendant's family.

Laches (here) for two years, held to disentitle to relief.

66. Where a plaintiff lay by for two years before filing a bill for an injunction, having seen labels of the defendant exhibited publicly, which he now complained of as being colourable imitations of his labels, Vice-Chancellor Sir W. P. Wood held, that such laches disentitled the plaintiff to relief (5).

Plaintiff carrying suit

67. Where an order had been made for an interim injunction to

(1) *Ainsworth v. Walsley*, L. R. 1 Eq. 518. (3) *Beard v. Turner*, 13 L. T. (N. S.) 746.

(2) *Ib.*

(4) 14 W. R. 512.

(5) *Beard v. Turner*, 13 L. T. (N. S.) 746.

restrain an alleged infringement of a trade mark, and the defendant, wishing to avoid further litigation, agreed to pay all costs, and to give an undertaking not to use the trade mark complained of; Vice-Chancellor Sir J. Stuart held, that the plaintiff persisting in carrying on the suit to a hearing, was not entitled to his costs (1). But in *Tonge v. Ward* (2), where a manager, without the personal knowledge of his master, W., affixed tickets with the defendant's name printed thereon to certain goods of inferior quality to the defendant's and made by another manufacturer, and on the defendant's complaining of this, W. offered to give an undertaking that he would not use such tickets again, and to pay a certain sum, but declined to make a public admission that he had used the tickets in order to defraud the defendant; the Court held, that, notwithstanding W.'s offer, the defendant was entitled to an injunction with costs, and also to an inquiry as to damages at his own risk.

to hearing, where defendant agreed to pay costs and give undertaking not to use mark—not entitled to his costs (*sed contra* ne case).

68. The Court will not restrain the use of a label on the ground of its general resemblance to the trade mark of another manufacturer, if it is different in the points which a customer would look at in order to see whose manufacture he was purchasing (3).

No injunction on ground of general resemblance, where difference in points which a customer would look at.

69. Where a trader produced and sold an ink which he designated "Stephen's Blue Black," and it was shewn to the public in a label in white capital letters of large type, and the defendant sold an ink in bottles similar in size, designated as "Steelpen's Blue Black," also in white capital letters of large type; Vice-Chancellor Sir W. P. Wood held, that this was a colourable imitation of the trade mark, and the defendant was restrained by injunction from the further use of it (4).

"Steelpen's blue ink" and similar label, held a colourable imitation of "Stephen's blue ink."

70. In 1847 Baron von Liebig discovered and published a process for making an extract of meat. The extract was made extensively at the Royal Pharmacy, Munich, and sold there, with the permission of the Baron, as "Liebig's Extract of Meat" from 1861 to 1864. It became generally known in Germany and other countries, and the term "Liebig's Extract of Meat" became used as a term of art in

A term of art is not protected as a trade mark.

(1) *Hudson v. Bennett*, 12 Jur. (N. S.) 519. (3) *Blackwell v. Crabb*, 36 L. J. (Ch.) 504.

(2) 21 L. T. (N. S.) 480. (4) *Stephen v. Peel*, 16 L. T. (N. S.) 145.

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scientific treatises. In 1864 Baron Liebig gave the Fray Bentos Company the right of using his name in connection with the extract of meat manufactured by them. In 1864 a company bought the business and property of the Fray Bentos Company, and by a deed-poll dated the 12th of April, 1866, the Baron granted to the plaintiff company the exclusive right and privilege to use his name in connection with the extract manufactured by them. The defendants, who had previously sold extract manufactured by the Fray Bentos Company, in 1866 began to sell as "Liebig's Extract of Meat" an extract manufactured by Mr. Tooth, in Australia, after Liebig's process. On a suit being instituted by the plaintiff company to restrain the defendants from so using the name "Liebig's Extract of Meat," Vice-Chancellor Sir W. P. Wood held, that the term having been used as a term of art to designate a well-known process long before 1861, the defendants were fully justified in using it, and the bill was dismissed with costs (1).

An inscription amounting to a representation that the parties had succeeded to the business of a late firm was enjoined, at suit of one of the late firm who had set up business near one of the places of business of late firm.

71. Where R. Scott and W. Scott carried on business at N. and G. in partnership under the firm of "R. & W. Scott," and by an agreement for dissolution it was agreed that one of the partners should remain at N., but there was no stipulation by which either party bound himself not to continue the business, but only that they would not carry it on together, and there was no disposition of the goodwill to the partner who remained at N., and neither party was to use the name of the firm except so far as might be necessary in winding up the partnership affairs; and shortly after the date of the agreement W. Scott retired from the business, and set up for himself at T., near N.; and the inscription used by the firm over the door of their place of business at G. had been "R. & W. Scott of N.;" R. Scott made over his business at N. and G. to the defendants, who, at their premises at G., made use of the inscription "Scott & Nixon, late R. & W. Scott of N.;" on the application of W. Scott, Vice-Chancellor Sir W. P. Wood granted an injunction restraining them from using such an inscription, inasmuch as it amounted to a representation that they had succeeded to the business of the late firm (2).

72. An infant who had sold spurious articles, representing them

(1) *Liebig's Extract of Meat Company v. Hanbury*, 17 L. T. (N. S.) 298. (2) *Scott v. Scott*, 16 L. T. (N. S.) 143.

to have been manufactured by the plaintiff, was ordered by the Master of the Rolls (Lord Romilly) to pay the costs of a suit for an injunction (1).

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73. In a case of alleged fraudulent imitation of a musical publication (independently of copyright), where the Court did not consider the fraud clearly made out, it held that an injunction ought only to be continued on the terms of the plaintiff undertaking to bring an action, and to be answerable in damages (2).

Alleged fraudulent imitation of a publication, not clearly made out, injunction only continued on

terms of undertaking to bring an action and being answerable in damages.

74. The use of the word "patent" having come to be applied in common language to various manufactured articles as a word of art, and descriptive of a particular class of goods, without any reference to letters-patent, the use of the words "patent thread" as part of the description in a label or trade mark on an unpatented article, is not such a misrepresentation as to deprive the owner of his right to be protected against the infringement of his label, where the goods, from the usage of many years, have acquired the designation in the trade generally of "patent" (3).

The word "patent" as a word of art, and descriptive of a particular class of goods, is not such a misrepresentation as to deprive of right to protection of trade mark.

75. In substance there is no distinction between the sale of a business and goodwill by a trader himself, and a sale by his assignees in bankruptcy (4). Therefore, on a sale of a business by a trader's assignees in bankruptcy, the trader has no right, upon setting up a fresh business after his discharge, to use the trade marks of his own business, or in any other way to represent himself as carrying on the identical business which was sold, although he has a right set up again in business of the same kind next door to his old place of business (5). In such a case it is no objection to the purchaser coming for the assistance of the Court, that he has continued to use the name of the old business which he found there (6).

No distinction between sale of business and goodwill by trader, or by his assignees in bankruptcy, and trader no right after his discharge to use trade marks of sold business, or to represent that he is carrying on the identical business sold.

76. In *Lee v. Haley* (7), Vice-Chancellor Sir R. Malins said that

No one is allowed to

(1) *Chubb v. Griffiths*, 35 Beav. 127.

(6) *Ib.*

(2) *Chappell v. Davidson*, 8 De G. M. & G. 1.

(7) 39 L. J. (Ch.) 284; L. R. 5 Ch. 155; 18 W. R. 181, 242; 22 L. T. (N. S.) 251, 546; *v. Croft v. Dwy*,

(3) *Marshall v. Ross*, L. R. 8 Eq. 651; 39 L. J. (Ch.) 225; 17 W. R. 1086; 21 L. T. (N. S.) 261.

7 Beav. 86; *Perry v. Truefitt*, 6 Beav. 66; *Kelly v. Hutton*, L. R. 3 Ch. 708;

(4) *Hudson v. Osborne*, 39 L. J. (Ch.) 79.

16 W. R. 1182; *Bradbury v. Beeton*, 18 W. R. 33.

(5) *Ib.*

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use a trade mark so as it may mislead and deceive the public.

Injunction to restrain using the name "Pall Mall Guinea Coal Company" in Pall Mall, granted to "Guinea Coal Company" having offices in Pall Mall.

But no relief if plaintiffs had systematically and knowingly been delivering short weight.

A trade secret learnt from an employer, and the article sold after em-

whenever a name was established (i.e., as a trade mark) and its use had obtained, no one else could adopt the same name, because by doing so he might lead the public into believing they were dealing with one person when they were really dealing with another; that the Court said, you shall not so deceive the public; that the Court would restrain anything which might have the effect of so deceiving the public, and that its doctrines were not restricted by any technical rules as to property. In this case plaintiffs were, in August, 1869, and had for some time previously, been carrying on business under the style of the Guinea Coal Company, their offices being at No. 22, Pall Mall; and in the early part of 1869 the defendant, who had formerly managed their business, and was known personally and by his handwriting to the plaintiffs' customers, established a business on his own account under the style of the "Pall Mall Guinea Coal Company," his offices being first at Beaufort Buildings, whence, in August, 1869, he removed to No. 46, Pall Mall, and the words "Pall Mall Guinea Coal Company" were on his blind; and the defendant solicited orders principally by circular, sending circulars to many of plaintiffs' customers, and had succeeded in obtaining orders, which the customers afterwards said they had intended for the plaintiffs; Lord Justice Giffard held, affirming a decision of Vice-Chancellor Malins, that they were entitled to restrain him from using the name "The Pall Mall Guinea Coal Company" in Pall Mall. But if the plaintiffs had, as alleged, been systematically and knowingly carrying on a fraudulent trade, and delivering short weight, Lord Justice Sir G. M. Giffard said it was beyond all question that this Court would not interfere to protect them in carrying on such trade. Although the bill was not filed till the 24th of November, 1869, the Court held, that there was no laches, inasmuch as the plaintiffs were obliged to wait until sufficient proof of the injury they had received was collected (1).

77. When a man has learnt a trade secret from his employer, and practised it after the employer's death, selling the article under the old name, he will not acquire such a right to the

(1) *Lee v. Haley*, 39 L. J. (Ch.) 284; L. R. 5 Ch. 155; 18 W. R. 181, 242; 22 L. T. (N. S.) 251, 546.

exclusive use of the name as a trade mark as will be protected in a Court of Equity (1).

player's death,
under old
name, gives

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no right of use of name as a trade mark.

78. Where W. originally manufactured starch at a place called Glenfield, and for this reason he called his starch the "Glenfield Starch," and it became well known in the market by that name, and he continued to use this name, though he removed his manufactory from Glenfield, and on the labels which were placed on the packets of his starch it was called the "Glenfield Starch," and C. set up a starch manufactory at Glenfield, and called his starch by a different name, and his labels were of the same colour as those of W., but labels of this colour were used by all starch manufacturers, and at the bottom of C.'s labels were these words, "C. & Co., manufacturers, Glenfield;" and a bill was filed to restrain C. from making use of the word "Glenfield;" Lord Justice Sir W. M. James held, reversing a decision of Vice-Chancellor Sir R. Malins, that C. had done nothing to represent his starch to be the same as that of W., and that the words "C. & Co., manufacturers, Glenfield," were true, and not told in a way to deceive, and, consequently, no injunction ought to be granted (2).

If there is no false representation that the article is the same as that of the plaintiff—a trade mark will not be enjoined—the words here "Glenfield, &c." being true, and not told in a way to deceive.

79. In England the assumption of a name, the patronymic of a family, by a stranger, who has never before been called by that name, is not the subject of a civil action, as by the English law there is no right of property in a person to the use of a particular name to the extent of enabling him to prevent the assumption of his name by another (3). But it is otherwise as to the exclusive use of a name in connection with a trade or business, which right is recognised in this country, and a party using it is considered to have been guilty of a fraud, or at least of an invasion of another's right, and renders himself liable to an action, or he may be restrained from using the name (4).

The assumption of a name, the patronymic of another family, will not be restrained;

Unless the name is used in connection with a trade.

80. Where B. & Co. for many years had affixed a label or trade mark to the bottles in which their ale was sold, and D. & Co. adopted a label bearing a general resemblance to that of B. & Co.,

(1) *Hovenden v. Lloyd*, 18 W. R. 1132.

(2) *Wotherspoon v. Currie*, 18 W. R. 942; 23 L. T. (N. S.) 443.

(3) *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430; 17 W. R. 594; 38 L. J.

(P. C.) 35; 6 Moo. P. C. C. (N. S.) 31; 22 L. T. (N. S.) 228. (4) *Ib.*

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Costs not willingly given where infringement avoided by sailing near the wind.

Any person may manufacture articles (and if a patent, after expiration of patent) which have become known by a name, and use that name, but he must not lead public to believe he is agent of original manufacturer.

A defendant guilty of the fraud, though successful on another point—ordered to pay whole costs.

"Schweitzer, Atkins, & Co.'s Coccatina," held a colourable imitation of "Schweitzer's Coccatina, or &c. Cocoa."

but differing from it in several particulars, the Court dismissed a bill by B. & Co. to restrain D. & Co. from using such label with costs. But if a trader imitates another person's label or trade mark, and sails so near the wind as just to avoid an injunction, though the Court does not grant the injunction, it will not willingly give him any costs of the proceedings (1).

81. When articles of a particular kind of an original manufacturer (or patentee, as the case may be) have become generally known in commerce, any person has a right after the expiration of the patent to manufacture such articles and sell them under that name; but he may not, in inscribing the name as a proper name on his shop-front, or otherwise, lead the public to believe that he is selling as the agent for the original manufacturer (2).

82. A defendant whom the Court held, on the chief point in issue, to have been guilty of a fraudulent misrepresentation, was, though successful on another point, ordered to pay the whole costs (3).

83. Where the plaintiff, carrying on business as "H. Schweitzer & Co.," sold a preparation of cocoa labelled, "Schweitzer's Coccatina, or Anti-dyspeptic Cocoa," and the defendant, who had been in his employ, set up business in partnership with a man also named Schweitzer, and sold a similar preparation of cocoa, labelled "Schweitzer, Atkins, & Co.'s Coccatina," Vice-Chancellor Sir R. Malins held, that this was a fraudulent and colourable imitation, and an injunction was granted accordingly (4).

84. The general rule is, that where a manufacturer adopts a certain trade mark, and stamps it upon the article manufactured, he is (subject to the question of the extent of user necessary (5)), entitled to the exclusive use of it, and a Court of Equity will restrain by injunction any other person who pirates such trade mark from using it. It is no defence that the article simulating the genuine one is of equal value with the genuine one (6). But

(1) *Bass v. Dawber*, 19 L. T. (N. S.) 626.

(2) *Wheeler and Wilson Manufacturing Company v. Shakespeare*, 39 L. J. (Ch.) 36.

(3) *Ib.*

(4) *Schweitzer v. Atkins*, 37 L. J. (Ch.) 847; 16 W. R. 1080; 19 L. T. (N. S.) 6.

(5) *Mandrew v. Bassett*, *post*.

(6) *Hilliard*, Inj. 2nd Ed. p. 490.

the article must be a vendible article, and in the market. In *McAndrew v. Bassett* (1), Lord Chancellor Westbury said: "The elements of the right to that property (*i.e.*, in a trade mark) may be represented as being the fact of the article being in the market as a vendible article with that stamp or trade mark at the time when the defendants imitate it."

85. An alien manufacturer may maintain a bill in the United States for an injunction against a citizen of the United States to restrain the use of a trade mark (2).

An alien is protected in the U. S. in the use of a trade mark.

86. Slight differences, which would not be perceived without strict examination, will not protect the imitation from the injunction (3). So a provisional injunction was granted to the assignee of a trade mark, restraining the use of a very similar trade mark, which was calculated to mislead the public into the belief that it was the plaintiff's, although it bore the defendant's name in very small letters (4). And an action to enjoin the use of a trade mark cannot be resisted by shewing that the names used on the trade mark are false and fictitious (5). The test of granting an injunction is held to be a substantial similarity, and an intent to continue the manufacture. It may be had against an agent, represented as the proprietor, without joining the real secret owner (6).

Slight differences will not protect the imitation from injunction. And the adding defendant's name in very small letters, is not sufficient to disentitle to injunction. False names on trade mark do not disentitle to injunction. The test is, a substantial similarity. Injunction

may be granted against agent represented as proprietor, without joining real secret owner.

87. In order to procure an injunction: first, an intent must be shewn to injure the originator, by disposing of the defendant's wares as his; secondly, if consisting of words, they must indicate ownership and origin, not merely quality, kind, texture, composition, utility, intended use, or class of consumers. Names having a definite and established meaning, and not indicating ownership, origin, or something equivalent, cannot be exclusively appropriated. Thus, the plaintiffs, being importers of gin, were accused to label it "Club-house Gin." The defendants afterwards labelled their gin "Club-house, J. T. Daley," and painted, upon

To entitle to injunction: 1st, intent must be shewn to injure originator by disposing of wares as his; 2ndly, if words, they must indicate ownership and origin, not merely quality, &c. Names having a definite and established meaning, and

(1) 33 L. J. (Ch.) 561, 567; *v. pl.* 5, ante.

(2) *Taylor v. Carpenter*, 11 Paige, 292 (Amr.).

(3) *Williams v. Johnson*, 2 Rosw. 1 (Amr.).

(4) *Walton v. Crowley*, 3 Blatchf. C. C. 440 (Amr.).

(5) *Stewart v. Smithson*, 1 Hilt. 119 (Amr.).

(6) *Bradley v. Norton*, 33 Conn. 157.

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not indicating
ownership,
&c., will not
be protected.

boxes containing it, "London Club-house Gin, sole importer, Wm. H. Daley." "Club-house" denoted a superior quality of gin, like *imperial, royal, &c.*; held, the defendants should not be enjoined from their use of the word (1).

SECT. 5. *Letters.*

The Court
will restrain a
company
opening
letters
addressed to
their former
manager at
the address of
the company,
except in his
presence,
unless after
notice—but
Postmaster-
General is not
a proper party
to the bill as
defendant.

1. Where the plaintiff, who had been for some years manager of a company carrying on business at 190, Regent Street, severed the connection, and set up in the same line of business at 203, Regent Street, and advertisements had been published stating that he was no longer manager of the company; and letters, some of them on his own private affairs, continued to be occasionally addressed to the plaintiff by name, at 190, Regent Street, as to which letters, forwarded by the Post Office to 190, the company claimed the right of opening and deciding whether they were intended for the plaintiff or themselves; upon motion by the plaintiff to restrain the company from receiving and opening letters addressed to him by name, at 190, Regent Street, and bearing no external indication that they were intended for the company, and also to restrain the Postmaster-General from delivering letters so directed to any other than A.'s present address (203, Regent Street), Vice-Chancellor Sir W. P. Wood held, that as against the Postmaster-General, who had been improperly brought before the Court, the motion must be refused; but that the company must give an undertaking until the hearing not to open, except in the plaintiff's presence, letters addressed to him at 190, Regent Street, unless, after due notice, the plaintiff should not attend at the company's offices for the purpose by a specified hour (2). And in *Scheile v. Brakell* (3), Vice-Chancellor Sir J. Stuart granted an injunction restraining the defendants from opening letters addressed to the plaintiffs, their predecessors in business, from whom they had obtained exclusive licenses to work particular patents. The plaintiffs possessed many more patents than those for which they had granted exclusive licenses to the defendants; the defen-

The Court
will restrain
successors to
business open-
ing letters
addressed to
predecessors.

(1) *Corwin v. Daly*, 7 Bosw. 222 (Amr.).

(2) *Stapleton v. Foreign Vineyard Association*, 12 W. R. 976.

(3) 11 W. R. 796.

dants had given notice to the postmaster at Oldham to send them all letters addressed to the Plaintiffs & Co., Oldham, and accordingly letters so addressed were received and opened by them. The Vice-Chancellor said that the defendants had persisted in receiving and opening letters bearing names upon them which were not their names, and that the defendants had no right whatever to open letters merely because it happened that they were addressed to the town or the place where they carried on business; that it had been argued they had a right to do so because they had licenses to work patents belonging to the plaintiffs; he said they might have contracted for that right, but had not; that one letter from India contained an order for a centrifugal pump, for the manufacture of which the plaintiffs possessed a patent, and that the defendants replied by sending their list to the correspondent; and that the plaintiffs were clearly entitled to an injunction.

2. If a solicitor of a company writes a letter apparently on behalf of the company, he has no such property in the letter as to entitle him to prevent its publication, although he swears that it was written in his private capacity (1).

Solicitor of company writing apparently on behalf of company, no such property in letter as to entitle to prevent publication.

3. The sending of a letter bearing the character of a literary composition does not give the person to whom it is transmitted the right to publish it for his own benefit; otherwise, if published to vindicate his character from false imputations cast upon him by the writer (2); and where a defendant moved (on putting in an answer) to dissolve an injunction obtained against his selling a book of 'Letters from Pope, Swift, and others,' the Lord Chancellor said a collection of letters, as well as other books, is within the intention of the Statute of 8 Anne; but the receiver of a letter has at most but a joint property with the writer, and possession does not give him license to publish it, and the injunction was continued as to letters written by Mr. Pope, but not as to those written to him (3). But in *Hopkinson v. Burghley (Lord)* (4), it was held that the receiver of a letter is the owner of it, and may use it for all lawful purposes; and that the only right which the writer of it has in

The Court will restrain publication of letters.

(1) *Howard v. Gunn*, 32 Beav. 462.

(3) *Pope v. Curl*, 2 Atk. 342.

(2) *Perceval (Lord) v. Phipps*, 2 V.

(4) L. R. 2 Ch. 447; 36 L. J. (Ch.)

& B. 19.

504.

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But a defendant in a suit cannot refuse to produce private and confidential letters—but plaintiff put upon undertaking not to use them for collateral object.

If the sender of a letter wishes to restrain receiver shewing it to any other person, he must file a bill.

The author of any letter has the exclusive right of publishing it, except to vindicate rights or character of receiver.

reference to it, is to restrain publication; and it was also held that a defendant in Equity cannot refuse to produce private and confidential letters from a stranger, on the ground that the writer forbids their production. But the plaintiff will be put upon an undertaking not to use them or any copies of them for any collateral object. Lord Justice Sir G. J. Turner said that the writer of a letter trusts the receiver with the letter, and he must take the consequences of its being in his possession, and that the question which then arose was between a stranger and the receiver; that if the sender of a letter wishes to restrain the receiver from shewing it to any other person, he must file a bill for that purpose; and that unless that was done the property was in the receiver; and Lord Justice Lord Cairns said that the question in all these cases was, what was the purpose or object in the mind of the person sending the letter; that the writer was supposed to intend that the receiver might use it for any lawful purpose, and that it had been held that publication was not such a lawful purpose; but that if there was a lawful purpose for which a letter could be used, it was the production of it in a Court of Justice for the furtherance of the ends of justice; that in the present case the recipients were justified in declining to produce the letters without the direction of the Court, but that they could not then refuse to produce them, and that the costs would be costs in the cause.

4. The author of any letter or letters, or his representatives, whether literary compositions, or familiar letters, or letters of business, possesses the exclusive right of publishing them; and the receiver can only justify their publication, without the consent of the writer, by a necessity of vindicating his own rights or character(1).

SECT 6. *Chattels—Specific Chattels.*

Court has jurisdiction to order delivery up of a picture to the artist, but the jurisdiction not

1. Upon a bill to restrain parting with a picture, Vice-Chancellor Sir W. P. Wood held that the Court has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, or as being a specific chattel of a peculiarly valuable

(1) *Woolsey v. Judd*, 4 Duer. 379 (Amr.); *Hilliard, Inj.* 2nd ed. 479: *Perceval v. Phytips*, 2 V. & B. 19.

kind, the legal remedy being inadequate (1). But where by the terms of an agreement, and the frame of the pleadings, an artist seeking restitution of a picture had, in effect, put a fixed price upon it, the Vice-Chancellor held, that damages would be an adequate remedy, and that this circumstance raised an insuperable difficulty to the exercise of the jurisdiction of a Court of Equity in such cases (2).

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exercised if
damages
an adequate
remedy.

2. Where a chattel (in this case coal-wagons), from being used in business or otherwise, has a peculiar value, the Court will entertain a bill for an injunction to restrain its sale or detention (3); and where specific things necessary for conducting a particular business are in the possession of persons who claim a lien upon them, and threaten an immediate sale, this Court has undoubted jurisdiction to interfere by injunction, and prevent irreparable injury to the debtor, by giving him an opportunity of redeeming (4).

Sale or deten-
tion restrained
of chattels
having pecu-
liar value,
from being
used in
business.

3. Where a bill was filed for the delivery up of specific chattels (furniture and household effects) deposited by the plaintiff with A., his agent, which A. fraudulently contracted to assign to B., and B. advertised to be sold; and for an injunction to restrain the sale by B., and to restrain A. and B. from parting with the goods, the goods being still in the possession of A., the agent, the Court overruled a demurrer by B. (5); Vice-Chancellor Sir J. Wigram said, the question here was, whether a Court of Equity would not, at the suit of the principal, restrain his agent from parting with the possession of his property, by which the plaintiff's title would be embarrassed, if not defeated; and that he had not the slightest doubt that the plaintiff was entitled to the protection of the Court against the wrongful act which was threatened by his agent, and that he had known many bills to have been filed in the Court of Exchequer (then) formerly, on behalf of the owners of cargoes, to prevent improper dealings with the goods by their agents, or persons in the situation of agents, and that the right to be protected in the use or beneficial enjoyment of property *in specie* is not

The Court
will restrain
agent parting
with specific
chattels
deposited by
principal.

The right to
be protected in
the beneficial
enjoyment of

(1) *Dowling v. Betjemann*, 2 J. & H. Co., 2 Giff. 64.

544; *v. Fells v. Reud*, 3 Ves. 70; *The* (4) *Ib.*

Pusey Horn Case, 1 Vern. 273.

(2) *Ib.* (5) *Wood v. Rowcliffe*, 3 Hare, 304;

(3) *North v. Great Northern Railw.* 6 Hare, 187; 2 Ph. 382.

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property *in specie*, is not confined to articles possessing peculiar or intrinsic value.

confined to articles possessing any peculiar or intrinsic value, and that in this case the plaintiff was clearly entitled to the injunction to restrain the sale of the goods, in order to carry into effect the attempted alienation of the property (1). And the jurisdiction of

The jurisdiction is not confined to chattels, the loss, &c., to which would not be adequately compensated by damages, but extends to all cases where possession is acquired through abuse of a fiduciary relation.

the Court by injunction to protect the possession, and to decree the delivery up of specific chattels, is not merely as to such the loss or injury to which would not be adequately compensated by damages, but extends to all cases where the possession has been acquired through an alleged abuse of a party standing in a fiduciary relation to the plaintiff (2).

Party privy to another party dealing with property as his own, not permitted to assert his own title against title created by that other.

4. Where A., the owner of certain chattels (tea-warrants), pledged them to B., who was a tea-broker, to secure advances made on his behalf by B.; and B. afterwards, in his own name, and unknown to A., repledged the same chattels to C. to secure advances made by C. to B., but of which, unknown to C., A. was to have the benefit; and C. having subsequently applied in vain to B. for payment of his advances, threatened to realize his security by a sale, which, however, he was from time to time induced to postpone by the solicitations of B., and his assurances of speedy payment; and this was communicated by B. to A., his principal; in a suit by A. against B. and C., praying to redeem the property in pledge on payment of any balance found due on the account between himself and B., it was held by Lord Chancellor Cottenham, overruling a decision of Vice-Chancellor Sir L. Shadwell, that A. had no equity to restrain C. from proceeding to an immediate sale, for a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not, in Equity, be permitted to assert his own title against a title created by that other, although he derives no benefit from the transaction (3).

(1) *Wood v. Rowcliffe*, 3 Hare, 304; (2) *Wood v. Rowcliffe*, 2 Ph. 382; 6 Hare, 187; 2 Ph. 382. S.C. 3 Hare, 304; 6 Hare, 187.

(3) *Nicholson v. Hooper*, 4 My. & Cr. 179; reversing S. C. 2 Jur. 9.

SECT. 7. *Fixtures.*PART I.
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1. In *Richardson v. Ardley* (1) the Court overruled a demurrer to a bill filed by a landlord, alleging that, under an execution against his tenant, the sheriff was about to sell all the property on the demised premises, and it appeared by the handbills that it was intended to sell the fixtures on the premises.

Sale of fixtures restrained.

2. Trade fixtures may, by contract, be rendered irremovable; and where a lease had been made to an oil-refiner of some land, "and also the erections and buildings then already erected and built, or to be erected and built thereon;" and the lessee covenanted to deliver up at the end of the term "pumps, pipes, cisterns, and other things which then were, or at any time during the said term shall be, fixed or fastened to the freehold of the premises, or belong thereto;" the Master of the Rolls, Lord Romilly, held, that the general words included the trade fixtures of the oil-refinery, and that they were consequently irremovable by the lessee, and granted an injunction to restrain a purchaser of boilers supported by brickwork from removing them and other trade fixtures (2).

Trade fixtures may, by contract, be rendered irremovable.

3. Unless the tenant protects himself by a contract giving him a right to take away the tenant's fixtures (in this case gas-fittings, shop and other fixtures) after the expiration of the term, either by effluxion, or lapse of time, or his own act, or re-entry on forfeiture, he cannot do so, and the Court will restrain their sale or removal (3).

Tenant's fixtures cannot be removed after expiry of term, unless by special contract.

4. Greenhouses built in a garden, and constructed of wooden frames fixed with mortar to foundation-walls of brickwork, were held by Vice-Chancellor Sir W. P. Wood to be fixtures, and not removeable by the occupier who built them; so a boiler built in the masonry of the greenhouse is also irremovable, also pits and a propagating-house; and the Vice-Chancellor granted a perpetual injunction against the removal of these erections, claimed as fixtures by the plaintiffs, the owners of the freehold, against two of the defendants, trustees under a deed for the creditors of the other -

(1) 38 L. J. (Ch.) 508.

(3) *Pugh v. Arton*, L. R. 8 Eq. 626;

(2) *Bidder v. Trinidad Petroleum Company*, 17 W. R. 153.

17 W. R. 984; 38 L. J. (Ch.) 619;
20 L. T. (N. S.) 865.

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defendant, the former occupier of the house and garden, the trustees having advertised for sale two greenhouses, the pits or frames, and the heating apparatus; but the pipes of a heating apparatus, which were connected with the boiler by screws, are removeable (1). But in *Syme v. Harvey* (2) the Court of Session (Scotland) held, that greenhouses, forcing-pits, and hotbed frames, erected by nursery-gardeners for the purposes of their trade, may, in so far as not consisting of brickwork, be removed by them at the expiration of their lease.

5. Where coal and ironworks were demised, together with lands, and mines under other lands not included in the demise, with liberty to the lessees to make and use roads and ways over any of the lands, and to do all such other acts upon the lands as should be necessary for the purposes of the works; and the lessees covenanted to uphold and keep in good repair the furnaces and other works, houses and other buildings, then standing, and which during the term should be erected and built on the demised land, and all other the demised premises, and at the expiration of the term to deliver up the property, and all ways and roads in, upon, or under the same lands, in such good order that the works might be continued by the lessor; the Court held, that this covenant did not extend to trams fastened to sleepers not affixed to the freehold, which the tenant had placed upon roads for the purpose of using them as tramways, and that the landlord, therefore, was not entitled to an injunction to restrain the tenant from disposing of them during the term (3).

6. Where a lessor during the term enjoins the removal of fixtures, a reasonable time shall be allowed the lessee, after dissolution, to demand and remove them, though the term expires pending the injunction (4).

(1) *Jenkins v. Gething*, 2 J. & H. 520.

(2) 24 Sc. Sess. Cas. 202.

(3) *Duke of Beaufort v. Bates*, 3 De G. F. & J. 381.

(4) *Bircher v. Parker*, 38 Miss. 115 (Amr.).

SECT. 8. *Game.*PART I.
CHAPTER II.

1. In *Frogley v. Earl Lovelace* (1), Vice-Chancellor Sir W. P. Wood restrained a landlord by an injunction from interfering with his tenant in the exercise of the exclusive right of sporting, and killing game, according to an agreement not under seal, until a lease should be executed under seal, according to such agreement, pursuant to the decree in the cause; but the Vice-Chancellor said, that if the agreement had been entered into by a deed—an instrument under a seal—he should have felt a good deal of difficulty as to whether he ought not to leave both parties to their rights at Law; and that *Wood v. Leadbitter* (2) had decided, that in order to acquire a right such as here claimed by the plaintiff, an instrument under seal is necessary; and that at Law an instrument purporting to grant such a right, though given for a valuable consideration, is revocable at any time, and without paying back the money; therefore that the plaintiff had no remedy at Law until the defendant should have executed a deed containing a proper and legal grant of the exclusive right of sporting in accordance with the terms of the agreement.

Court will, where agreement not under seal, restrain a landlord interfering with tenant in exercise of exclusive right of sporting and killing game—*quære*, whether it will do so where the agreement is by deed.

2. Deer in a park, when reclaimed, become personal chattels, and cease to be parcel of the inheritance. Therefore, in a suit by incumbrancers of a tenant for life of a deer-park and other property, upon a summons taken out at Chambers, and adjourned into Court, by the remaindermen to obtain a direction that the deer-park should not be let otherwise than as a deer-park, with proper covenants for preserving the deer, the application was refused on evidence that the deer were reclaimed (3).

Deer in a park, when reclaimed, are personal chattels.

3. A demise of the exclusive right of sporting over a farm does not justify the lessee in turning out on it game not bred thereon in the ordinary way; and the Master of the Rolls, Lord Romilly, said that he thought he could not prevent the defendant, the lessor, from reasonably exercising the right of keeping down any excess of rabbits that might have been brought upon his farm, but that that was not a question which he could determine, and that it must

Demise of exclusive right of sporting over a farm does not justify turning out on it game not bred thereon.

(1) Joh. 333.

(2) 13 M. & W. 838.

(3) *Ford v. Tynte*, 2 J. & H. 150.

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be settled by an action at law after the lease had been executed (1). This was a bill for specific performance of an agreement for a lease, and for an injunction to restrain an ejectment, and to restrain the defendant from destroying, or permitting to be destroyed, any game upon the farm. The Master of the Rolls made a decree for specific performance, and restrained the ejectment, but required the plaintiff to give an undertaking not to breed and turn out on the farm rabbits and pheasants bred on other lands.

SECT. 9. *Pictures—Paintings.*

A painter has, before publication, right to prevent copying picture, so purchaser has same right—the sale of a picture is not a publication.

1. At Common Law a painter has, before publication of his picture, a right to prevent any person copying it; and the owner of the picture who has purchased it from the painter has the same right; but after publication that right is lost, but the sale of a picture is not a publication of the picture (2).

Publication of wood-engraving, with descriptive article, not publication of the picture itself.

2. The publication of a wood-engraving in a magazine, with an article describing the picture, is not a publication of the picture itself (3).

Nor exhibition at public gallery, where copying not permitted, nor exhibition to obtain subscribers to an engraving. Purchaser of right to make an engraving and of right to exhibit the painting, entitled to an injunction to restrain the publication of coloured photographs of a group arranged to resemble the picture.

3. The exhibition of a picture at a public exhibition or gallery, where copying it would not be permitted, is not a publication of the picture, nor is the exhibition of the picture for the purpose of obtaining subscribers to an engraving of it, a publication (4); and where A., the painter of a picture, sold it to B., who, for valuable consideration, agreed to sell to C. the sole right to make and publish an engraving of the picture, and to exhibit it for short periods at any of the principal towns either in Great Britain or Ireland, in order that C. might obtain subscribers, and otherwise derive a full advantage in the publication and sale of the engraving; and the picture having been exhibited for that purpose, and the respondent arranged in his own studio a group which bore an exact resemblance to the picture, and took photo-

(1) *Birkbeck v. Paget*, 31 Beav. 403. Rep. 121; affirmed on appeal, 10 Ir.

(2) *Turner v. Robinson*, 10 Ir. Ch. Ch. Rep. 510.

(3) *Ib.*

(4) *Ib.*

graphs for the stereoscope (coloured so as to correspond with the picture), which he published and sold, the Court of Chancery in Ireland held that C. was entitled to an injunction to restrain the publication and sale of the photographs if the picture had not previously been published; but, it appearing that the picture had been previously exhibited at the Royal Academy, London, and at the Manchester Exhibition of 1857, the Court referred it to the Master to inquire whether there were rules, resolutions, by-laws or regulations to prevent the taking of copies, sketches, or drawings of paintings or works of art sent there for exhibition (1).

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SECT. 10. *Stock—Consols.*

1. Where an old woman had been induced, without consideration, to transfer her stock into the name of another person, who, by his answer, swore that there had been a gift of it to him subject to a trust for the transferror for life; the Master of the Rolls (Lord Langdale) continued an injunction which had been granted to restrain the transfer and receipt of the dividends, saying that the circumstances of the case were so fraught with suspicion that he could not bring himself to allow the defendant that the injunction obtained might be dissolved altogether, or that the defendant might have the income pending the suit (2).

Upon transfer of stock, without consideration, by an old woman, alleged to be a gift subject to a life interest in transferror, Court restrained transfer and receipt of dividends pending suit.

2. Where a transfer is about to be made of stock to wrong persons through mistake, the Court will not grant an injunction *ex parte* against the defendant to restrain the transfer, unless the plaintiff swears that he believes the defendant will avail himself of the error, and will refuse to make a retransfer (3).

Transfer of stock to wrong person by mistake, not restrained, unless upon affidavit of belief defendant will refuse to retransfer.

3. The remedies given by the 4th and 5th sections of 5 Vict. c. 5, are in substitution for the writ of *distringas* under the former practice in the Exchequer; and therefore, where a party had put a *distringas* upon a sum of stock before the passing of that Act, and that *distringas* had been removed upon the usual notice, the Court held that it was not competent to him, after the passing of the Act,

(1) *Turner v. Robinson*, 10 Ir. Ch. Rep. 121; affirmed on appeal, 10 Ir. Ch. Rep. 510.

(2) *Custance v. Cunningham*, 13 Beav. 363.

(3) *Arkwright v. Gryles*, 13 L. J. (N. S.) Ch. 303.

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to apply for an injunction under the 4th section of that Act (1). The Lord Chancellor, in *Ex parte Marquis of Hertford* (2), said that he had not intended to lay down any such rule as that a party who had sued out a *distringas* under the 5th section of the statute could not afterwards obtain an injunction under the 4th section, having merely decided in *Ex parte Amyot* that a party who had exhausted his remedy under the old practice in the Exchequer could not afterwards avail himself of the remedies given by the then recent statute (the 5 Vict. c. 5); and the Lord Chancellor said he desired that it might not be understood to be his opinion that a party was precluded, by suing out a *distringas* under the 5th section, from afterwards applying for an injunction under the 4th section.

4. In *Lord Chadworth v. Edwards* (3), Lord Chancellor Eldon granted an injunction until answer, restraining a transfer of stock standing in the name of a steward, on strong evidence by affidavit that it was (though it may have been mixed with his own) the produce of his master's property, rents, &c., received for many years without account; and Lord Eldon said that he did less mischief by fixing the injunction upon the whole, till the defendant informed him what was his master's, than by not fixing the injunction upon any part, giving him the opportunity of doing enormous injustice; but upon reconsideration refused an injunction as to money at his bankers in his name, as that payment was made two years previously, and that it was too much to infer that it was the same money unconverted.

5. In *King v. King* (4), the Court granted an injunction to restrain the transfer of stock or dividends standing in the name of the testator, or in the defendant's own name, belonging to the testator, and appointed a receiver to collect the outstanding property *pendente lite* in the Ecclesiastical Court upon different wills of the testator.

6. Where a widow (whose husband had died leaving children) was, as administratrix, possessed of property of the intestate, consisting of Bank Stock, a motion to restrain her from disposing of it, and to pay the same into Court, was refused; but, being clearly entitled to her third, she was ordered to pay two-thirds into Court (5).

(1) *Ex parte Amyot*, 1 Ph. 130.

(2) 1 Ph. 129.

(3) 8 Ves. 46.

(4) 6 Ves. 172.

(5) *Rogers v. Rogers*, 1 Anstr. 174.

SECT. 11. *Policies.*PART I.
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1. A policy-holder, by whose policy the funds of a company were made liable to pay the sum insured, and shares of profit by way of bonus, was held entitled to an injunction to restrain the company from transferring its business and assets to another company contrary to the provisions of the deed of settlement, and without making provision out of its own assets for payment of the policy (1).

2. Where the defendant, a creditor, had agreed that judgment should not be entered up against the plaintiff, his debtor, upon a warrant of attorney, unless default should be made in payment of the premiums of a policy of life insurance, which was effected to secure the debt, and that payment of the debt should not be required so long as the policy was kept on foot, and the plaintiff permitted the time for payment of the premium to expire, and four days afterwards the defendant paid the premium and procured the policy to be revived; the Court refused to relieve the plaintiff against the consequences of his default in payment of the premium, and dismissed a bill brought by him to restrain the defendant from suing out execution against the plaintiff on the judgment (2).

3. Where J. H., having effected a policy of insurance on his own life, had assigned it to the defendant, T. M., in trust for J. M., a minor, but the deed contained no exonerating clause or declaration that the trustees' receipt should be a good discharge, and the insurance company had notice of the trust, and after the death of J. H. refused to pay T. M., who was also the executor of J. H., on the grounds that there was no exonerating clause or declaration that T. M.'s receipt should be a good discharge, and also, that he had attempted to obtain the money to apply it to his own uses, in breach of the trust; on an injunction bill filed by the company against T. M. and J. M., to restrain proceedings at Law by T. M., alleging those facts, and offering to bring the money into Court, it was held, on the motion, that though the bill might probably be dismissed, yet as there was a question for the hearing, the Court

(1) *Kearns v. Leaf, Aldebert v. Kearns*, 1 H. & M. 681.

(2) *Winthrop v. Murray*, 8 Hare, 214.

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SECT. 11.

Concealment
of ship's
danger on
insurance,
policy to be
delivered up.

would not anticipate the decision of the cause, but would grant the injunction (1).

4. Where a merchant, having a doubtful account of his ship, which was at sea, viz. that a ship described like his was taken, insured her, without giving any information to the insurers of what he had heard, either as to the hazard, or circumstances which might induce him to believe that his ship was in great danger, if not actually lost; upon a bill by the insurers for an injunction, and to be relieved against the insurance as fraudulent, Lord Chancellor Macclesfield,—observing that the insured had not dealt fairly with the insurers in this case, and that he ought to have disclosed to them what intelligence he had of the ship being in danger, which might have induced him, at least, to fear that it was lost, though he had no certain account of it; and that if this had been discovered, it was impossible to think that the insurers would have insured the ship at so small a premium as they had done, but either would not have insured at all, or would have insisted on a larger premium, so that the concealing of this intelligence was a fraud:—decreed the policy to be delivered up with costs, but the premium to be paid back, and allowed out of the costs (2).

5. Where the parties to a suit in Equity restrained an insurance company to retain in their possession, during the progress of the suit, moneys due by the company to one of the parties, the Court (Ireland), upon an appeal, held, that the company was merely acting as stakeholders, and in such capacity was not liable to pay interest upon the said sums while so remaining in their possession (3).

6. Where plaintiffs, underwriters, having executed to the defendants, iron merchants, a policy of a marine insurance on a cargo which suffered loss, filed a bill for the rectification of the policy, so as to make it conformable to that which they said was the real contract between the agents, in proof of which they produced in evidence the slip which was signed by their agent when presented at Lloyd's by a clerk of the defendants' insurance broker, but the defendants denied that they ever entered, or intended to enter, into any contract other than that expressed by the policy; Vice-Chan-

(1) *Fernie v. Maguire*, 6 Ir. Eq. Rep. 137. (2) *De Costa v. Scandret*, 2 P. Wms. 170.

(3) *Farmer v. Farmer*, 15 W. R. 371.

cellor Sir W. M. James held, that, as the slip formed no contract, and there was no binding agreement between the parties until the policy was signed, and the premium paid, the bill for the rectification of, and for an injunction to restrain actions upon, the policy, must be dismissed with costs (1).

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SECT. 12. *Deeds.*

1. Where a conveyance executed for the purpose of giving the grantee, his younger son, a colourable qualification to kill game, remained without being made use of in the grantor's hands, and after his death in his eldest son's hands, and the grantee, by deceit, afterwards obtained possession of it, and proceeded to recover possession by ejectment; Lord Chancellor Eldon, upon a bill brought to obtain the delivery up of the deeds, and to restrain the action, said that his idea was, that the bill ought to have been dismissed in the first instance, and that if it came on to be heard on appeal, it would be very difficult to persuade him that the bill ought to have been entertained, and that the inclination of his opinion was that it was not a case in which either party had a right to apply to a Court of Equity (2).

Where deeds executed by both parties with fraudulent intent, no relief to either, *semble*.

2. No injunction will be granted until an instrument is produced, which, being lost, may not be capable ever to be produced; but the import of an instrument lost by negligence is to be taken most strongly against the negligent party, even although free from suspicion of spoliation (3).

SECT. 13. *Bills of Exchange—I. O. U.s—Promissory Notes.*

1. Where a bill-discounter obtained from a young man at college bills of exchange, I. O. U.'s, &c., for money advanced at high rates of interest; and subsequently a document, purporting to be an account of the advances, but being only a list of such bills of exchange, &c., was sent to the young man, the Lords Justices, Bill-discounter only allowed (here) money advanced and £5 per cent. upon bills, from young man at college.

(1) *Mackenzie v. Coulson*, L. R. 8 Eq. 368.

(2) *Brackenbury v. Brackenbury*, college. 2 J. & W. 391.

(3) *Power v. Sheil*, 1 Moll. 296.

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SECT. 13

affirming a decision of Vice-Chancellor Sir J. Stuart, held, that a letter signed by him acknowledging that the account between himself and the moneylender had been settled was not binding on him; and the Court ordered an account to be taken of the moneys actually advanced, with interest at £5 per cent., and that when the amount found to be due should be paid, the securities should be delivered up and cancelled (1).

2. It is a fraud on the bankrupt laws for any creditor secretly to bargain for or obtain a larger dividend than the other creditors; and this principle applies to a secret bargain after the bankruptcy, and before any composition under the arrangement clauses was agreed to; and on a bill by a bankrupt praying that it might be declared that the consideration for a certain bill of exchange for £394 14s. 8d., (namely a bill to secure a larger dividend than was received by the other creditors under the arrangement clauses, by private agreement made before the composition under the arrangement clauses was made) accepted by the plaintiff was illegal, and that such bill was void in the hands of the defendants, and that the defendants might be ordered to enter up satisfaction of the judgment for £408 11s. which had been signed by them; and in the third paragraph praying that the defendants might be restrained from taking the plaintiff in execution under the judgment, or from taking any other proceedings against the plaintiff's person or property under the judgment; Vice-Chancellor Sir J. Stuart decreed the bill of exchange to be delivered up, and declared that the bill was illegal and void in the hands of the defendants, and ordered them to enter up satisfaction on the judgment, and ordered the injunction to be made perpetual in the terms of the third paragraph of the prayer, and the costs to be paid by the defendants (2).

3. In *Billage v. Southes* (3) relief, on the principle of correcting abuses of confidence, was given against the liability of the maker of a promissory note, taken from a poor patient on the occasion of a change in his position in life, by his medical attendant, without any account having been rendered, and for an amount beyond

Surgeon
restrained
(here) from
recovering on
a promissory
note obtained
by abuse of
confidence.

(1) *Croft v. Graham*, 9 Jur. (N. S.) 1032; 9 L. T. (N. S.) 589.

(2) *Mare v. Sandford*, 1 Giff. 288.

(3) 9 Hare, 534; S. C. *nom. Billing v. Southes*, 21 L. J. (N. S.) Ch. 472;

16 Jur. 188.

what was due for his attendance on the most extravagant scale of charges. If the right to a benefit taken by a person in a confidential situation be questioned in Equity, and it is sought to be sustained as an exercise of liberality, it must be shewn that it was the intention of the party from whom the benefit emanated to be liberal; but intention imports knowledge, and liberality imports the absence of influence, and the onus of establishing a gift in such circumstances rests with the party who has received it. In this case the promissory note having been given under undue influence, the surgeon was restrained from recovering the whole amount, but the note was retained as a security for what should prove to be justly due.

4. Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a Court of Equity will restrain even a *bonâ fide* holder of the bill from suing the acceptor, and will direct the forged instrument to be delivered up to be cancelled (1).

5. Courts of Equity have a concurrent jurisdiction with Courts of Law in relieving against promissory notes, taken when overdue (2). The bill, in this case, alleged that S. had agreed to advance £8000 to the plaintiff, but that in the events nothing had been advanced on the note given for the sum, and that the note had inadvertently been left in S.'s hands, who had after it became due delivered it to the defendant as a security for a debt to a greater amount due from him to the defendant; and the Vice-Chancellor granted an injunction restraining an action commenced on the note. But this order was reversed by Lord Chancellor Lyndhurst (3); the Lord Chancellor observing that if the facts alleged were true, the equities disclosed would furnish a clear defence at Law, in which the question could be tried in a much more satisfactory manner.

6. In *Hood v. Aston* (4), an injunction was granted *ex parte* to restrain the negotiation of a bill of exchange, by a holder who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiff in the partnership's name.

Negotiation of bill of exchange restrained by holder with notice that it had been improperly accepted by a partner of plaintiff.

(1) *Esdaile v. La Nauze*, 1 Y. & C. 394; S. C. *nom. Esdaile v. Lanoge*, 4 L. J. (N. S.) Ex. Eq. 46.

(2) *Hodgson v. Murray*, 2 Sim. 515.

(3) *Ib.* 3 Sim. 283.

(4) 1 Russ. 412.

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Negotiation of
bill of ex-
change for
goods not delivered,

Bill to secure
procuration
money for a
commission is
void, and
Court inter-
feres even
after money is in sheriff's hands.

Negotiation of
bills for mar-
riage brokerage,
restrained.

7. In *Patrick v. Harrison* (1), the Court granted an injunction to restrain a defendant from negotiating a bill of exchange given for goods not delivered, the injunction being issued on certificate of bill filed, and to be served with the subpoena.

8. A bill of exchange given to secure procuration money agreed to be given to the colonel of a regiment for a commission is void, and the Court will interfere even after the money is in the hands of the sheriff on an execution at Law (2).

9. Where the plaintiff had given the defendant a note for undertaking to procure him a marriage, and the fact was supported by affidavit, the Court made an order upon the defendant to keep the note in his possession, and not assign or indorse it, but would not extend the injunction to prevent his proceeding at Law (3); and where a bill of exchange had been given on marriage brokerage consideration, the Court granted an injunction to prevent proceedings on it in the hands of an indorsee under the circumstances (4).

10. The Court will grant an injunction to restrain the negotiation of bills void in their creation (5).

11. The result of an examination of the authorities seems to be, that if a party has wrongfully obtained possession of a bill of exchange, although under circumstances which would give a complete defence at Law, Equity will nevertheless interfere, if from lapse of time or death of witnesses such defence is likely to fail; but that if the objection, being apparent on the face of the instrument, must always be open to the defendant whenever such action be brought against him, he is not entitled to apply to a Court of Equity for relief. Therefore, where A. had possession of a bill of exchange accepted by B., which, for reasons *dehors* the instrument, he could not enforce against B. in an action; Baron Alderson held, nevertheless, that B. had no equity to have the bill delivered up to be cancelled, unless he could shew that A. had the wrongful possession of it. And the cases of fraud where a bill has been

(1) 3 Bro. C. C. 476.

(2) *Whillingham v. Burgoyne*, 3 Anstr. 900.

(3) *Smith v. Aykwell*, 3 Atk. 566.

(4) *Cotton v. Catlyn*, 2 Eq. Abr. 525.

(5) *Lloyd v. Gurdon*, 2 Sw. 180.

ordered to be given up, are confined to those where the possession, but for the fraud, would be that of the plaintiff in Equity (1).

12. Where an overdue bill or note is indorsed after action brought, the indorsee with notice of the action has no right of action upon it (2).

13. Under an assignment of a ship and her present and future cargo, freight, and earnings, by the owner, for securing to the assignees all money which they had advanced, or might become liable to pay, on account of the vessel and her cargo, which they had furnished the means of purchasing, the assignees, who were also the ship's agents, were held entitled to retain a bill which was given for the purchase of part of the homeward cargo, and was remitted but not indorsed to them by the owner, notwithstanding he denied that it was remitted in payment, and stated that they had not paid, and, contrary to an express understanding, had left him personally liable to some of the debts incurred in fitting-out the vessel; and an injunction which had been obtained by the assignees, restraining an action of trover for the bill, was continued until the hearing (3).

14. Where the acceptor of a bill of exchange, who had, by the hands of the drawer, as his agent, paid the amount of the bill after it became due to an indorsee for value, without procuring it to be delivered up, filed his bill against such indorsee for value, and a subsequent indorsee, charging that the indorsee to whom the payment had been made had afterwards indorsed the bill to the other defendant without consideration, in order to recover the money from the plaintiff a second time, and praying that an action commenced against him for the amount might be restrained, and the bill be delivered up to be cancelled; the Court overruled a demurrer for want of the drawer as a party to the suit; for, taking the facts alleged in bill to be true, the plaintiff was entitled to relief without the presence of the drawer upon the record (4).

15. Vice-Chancellor Sir L. Shadwell allowed a demurrer to a bill for the delivery up of a bill of exchange the amount of which the defendant had recovered at Law, and had received from the plaintiff. The Vice-Chancellor said that he never remembered

(1) *Jones v. Lane*, 3 Y. & Coll. 281. (3) *Curtis v. Auber*, 1 Jac. & W.

(2) *Ib.* 526.

(4) *Earle v. Holt*, 5 Hare, 180.

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any instance of a bill being filed, to have a bond or bill of exchange delivered up, after an action had been brought and judgment recovered on it at Law (1).

16. *Semble*, where the parties intend that a promissory note shall be joint and several, but, through ignorance, it is expressed to be joint only, a Court of Equity will relieve as well against the surety as the principal (2). But the judgment of the Master of the Rolls was reversed by the Lord Chancellor (3); the Lord Chancellor observing, that he saw no ground for saying that anything more was intended than that there should be a joint liability, and that he could not alter the instrument on conjecture.

17. The indorsee of a bill of exchange which has been lost, has a remedy against the acceptor by a bill in Equity, and that although he might have recovered on the bill of exchange at Law, and the bill were a mere accommodation bill, and the plaintiff might have applied before, or though the drawer has since become insolvent; nor is the plaintiff in such a case bound to file his bill within any particular time (4); and in a bill by the indorsee of a bill of exchange which has been lost against the acceptor, it is not necessary to make the drawer a party (5).

18. In *Stevenson v. Anderson* (6) a bill of interpleader was sustained upon bills of exchange received by the plaintiff, as agent to procure payment for his principal in Scotland, to whom they were remitted against an order for goods, pursued in an action of trover by the party who so remitted them, and by attachment in Scotland by a creditor of that party.

Court relieves
against bills
of exchange
gained by
fraud, or upon
fictitious con-
sideration, or
ex turpi causâ,
or for bubble
mines, or ille-
gal assur-
ances.

19. In *Dyer v. Tymeuell* (7) the Court granted relief against a bill of exchange, said to be for value received, but gained by fraud, and for a fictitious consideration; and in *Robinson v. Cox* (8) a note given *ex turpi causâ* was set aside, and the purchase of a share in mines which proved to be a bubble, or money paid for effecting illegal assurances, are not such considerations as will support a bill of exchange in Equity (9); and in *Bishop of Winchester v.*

(1) *Threlfall v. Lunt*, 7 Sim. 627.

(2) *Rawstone v. Parr*, 3 Russ. 424.

(3) *Ib.* 539.

(4) *Davies v. Dodd*, 4 Price, 176.

(5) *Ib.*

(6) 2 Ves. & B. 407.

(7) 2 Vern. 122; 2 Freem. 112.

(8) 9 Mod. 263.

(9) *Browne v. Marsh*, Gilb. Eq. Rep. 154; *Ex parte Mather*, 3 Ves. 373.

Fournier (1) a promissory note, suspicious in itself under the circumstances, and the admitted object of it being an improper one, even if the note were actually genuine, was decreed, at the instance of the person alleged to have given it, to be deposited with the registrar of the Court in the first instance, with a declaration that the plaintiff was entitled to be relieved against it, without preventing the defendant from bringing an action on it within a reasonable time, and if delay in so doing, then to be delivered up.

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20. Where a bill stated numerous transactions between the plaintiff and C., and that the plaintiff had given him a bill of exchange for £1500 without consideration, which he had indorsed to M., who held it merely as a trustee, and had recently commenced an action upon it, and the bill prayed for an injunction, and for an account; a demurrer by M., for want of equity and for multifariousness, was overruled (2).

Court relieves against bills of exchange given without consideration indorsed to holder as a trustee;

21. In *Wynne v. Callander* (3) bills of exchange made in France on French stamps, and substituted in France for English bills of exchange, which were originally given for a gambling debt, were ordered to be delivered up; but the Master of the Rolls, Lord Gifford, said that, considering that the plaintiff was *particeps criminis*, and that the transaction took place in 1819 (the bill in Chancery was filed in 1824), and that the bills had been renewed from time to time, he ought not to give the costs of the suit, and under the old practice it was held that the Court would grant an injunction to prevent the negotiation of a note obtained at play upon affidavit before service of subpoena (4).

Or for gambling debts.

22. Where the plaintiff prayed a discovery, injunction, and delivery of a bill of exchange, upon the answers and evidence the right being clear, the Court refused an opportunity of trying it at Law, and decreed an immediate delivery (5).

If right clear, immediate delivery of bill ordered.

23. Where an action has been commenced by an indorsee of a note against the maker, which is impeached on the ground of fraud, and a distinct allegation that such note was not to be negotiated, but to be an item in the further settling of accounts

Court will restrain, until answer or further order, execution upon a judgment upon a bill impeached

(1) 2 Ves. Sen. 445.

(4) — v. *Blackwood*, 3 Anstr.

(2) *Knill v. Chadwick*, 16 L. J. 351.

(N.S.) Ch. 410.

(5) *Newman v. Milner*, 2 Ves. J.

(3) 1 Russ. 293.

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for fraud—and
alleging
notice in the
indorsee.

No relief
against a bill
negotiated
before notice
of failure of
consideration
given as the
price of a
guaranteed
article (which
turned out
worthless).

between the parties, and also an allegation that the indorsee had received such note with notice of the terms on which it was given, the Court will restrain the indorsee and his alleged agent from issuing execution on any judgment he may obtain in such action until answer or further order (1).

24. Where a bill of exchange given for the price of a guaranteed article, which turned out to be worthless, was negotiated by the seller before notice of the failure of consideration, Vice-Chancellor Sir W. P. Wood refused relief by way of indemnity for the losses in respect of the bill, after notice that the bill had been parted with; the remedy of the purchaser being at Law, it being simply a case for an action for damages for a breach of warranty, and there being no signs, in the bill filed, of a charge of having knowingly sold a worthless engine, the consideration for the bill of exchange (2).

25. Where A. filed a bill in Equity against B., for the cancellation of bills of exchange drawn by B. and accepted by A. in part performance of a contract of which B. failed to perform his part, and for an injunction to restrain B. from parting with or suing on the bills, and pending the suit A. commenced an action against B. for damages for breach of contract; the Master of the Rolls, Lord Romilly, held that the suit and action were not for the same matter, and an order to elect obtained by B. was discharged (3).

26. Where a bank presented to a firm of merchants bills of exchange for acceptance, and to the bills were attached memoranda stating that the bank held bills of lading for a specified quantity of cotton, and the firm, without asking to see the bills of lading, accepted the bills of exchange and retired them; and the bank and the firm had been in the habit of transacting business together, and had confidence in each other; and the bills of lading turned out to be forgeries, but the bank were ignorant of it, and acted in perfect good faith: on a bill filed by the firm seeking to obtain repayment of the money, and asking for an injunction to restrain the bank from making any payment of the money inconsistent with the plaintiffs' claim; Vice-Chancellor Sir R. Malins held, that the firm would have accepted the bills of exchange

(1) *Bainbridge v. Hemingway*, 12 L. T. (N.S.) 74.

(2) *Jackson v. Shanks*, 15 W. R. 55: 12 Jur. (N.S.) 917.

(3) *Anglo-Danubian Company v. Rogerson*, L. R. 4 Eq. 3.

whether they had seen the bills of lading or not, and that there had not been such representation by the bank as to the genuineness of the bills of lading as entitled the plaintiffs to recover (1).

27. Where T. purchased from the New Orleans Bank a bill drawn by them upon the Bank of Liverpool, and was told by the manager of the New Orleans Bank, at the time of the purchase, that the Liverpool Bank had, or would have, funds of the New Orleans Bank sufficient and applicable to meet the bill, and appropriated for the purpose; and before the bill was presented for acceptance the New Orleans Bank stopped payment, and the Liverpool Bank declined to accept the bill on presentation or to pay it at maturity, on the ground that though they had sufficient funds of the New Orleans Bank to meet the bill, none of such funds were specifically appropriated to the payment of it, and the course of business between the two banks was for the New Orleans Bank to remit to the Liverpool Bank bills for collection, and to draw bills against the remittances, taking care to keep them always in funds to meet the bills drawn upon them; the Court of Appeal (Lord Chancellor Hatherley and Lord Justice James) held—reversing a decision of Vice-Chancellor Sir J. Stuart—that there was no specific appropriation of the funds of the New Orleans Bank in the hands of the Bank of Liverpool to meet the bill, and that the statement of the manager was no more than a correct statement of the course of business between the two banks (2).

28. Where an absolute note was given, but, from a memorandum made at the time, and accompanying circumstances, it appeared that the note was to be collected only on a contingency which had not occurred; it was held, that Equity ought to grant relief (3).

29. Equity will, in general, enjoin the transfer of a specific thing, which, if transferred, will be irretrievably lost; as in the case of negotiable securities and stocks (4). So, where a person has negotiable securities in his possession under a void contract, Negotiation of securities under a void contract, restrained.

Note absolute in form, but contingent in fact, relieved against.

Transfer of negotiable securities restrained, where irretrievable loss would follow.

(1) *Leather v. Simpson*, 19 W. R. 31.

(3) *Clayton v. Lyle*, 2 Jones, Eq. 188 (Amr.)

(2) *Thompson v. Simpson*, L. R. 5 h. 659; 39 L. J. (Ch.) 857; 18 W. R.

(4) *Osborn v. Bank, &c.*, 9 Wheat. 738 (Amr.)

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A State Court of Chancery can restrain transfer of securities issued by another State. The negotiation of bills and notes obtained fraudulently, or upon an illegal transaction, as at play, will be restrained. A note left conditionally with a third person, relieved against in Equity, where obtained by a party improperly.

Relief against lost or destroyed promissory notes, upon tender of adequate security.

and is not of sufficient responsibility to answer for the value thereof, the negotiation of them may be restrained by injunction (1). So a State Court of Chancery (U.S.) has jurisdiction to grant an injunction at the suit of another State to restrain the transfer, within the former State, of negotiable securities issued by the latter (2).

30. Where a bill or note has been obtained fraudulently, or upon an illegal transaction, as at play, upon a bill filed charging these facts, supported by an affidavit, an injunction to prevent the negotiating or parting with the bill or note will be granted immediately upon filing the bill, and even before the service of the subpoena to appear (3). So, in Louisiana (U.S.), if the plaintiff came improperly into possession of a note which was left conditionally with a third person, the defendant's remedy is by injunction, not by an appeal from the order of seizure and sale (4).

31. Chancery will take jurisdiction and grant relief where a promissory note has been lost or destroyed, if the complainant tenders adequate security against loss to the defendant; otherwise he will be turned over to the Courts of Law (5).

32. The drawer of a bill cannot enjoin an innocent holder from collecting it of an accommodation acceptor, on the ground of fraud in the payee (6).

SECT. 14. *Bonds.*

1. Where E. purchased from O. a strip of land to which T. had set up a claim, and to secure E. from proceedings at the suit of T. a bond was executed by O. in an amount double that of the purchase-money; and the condition of the bond was declared to be, that if after twelve months had expired from the possession of the property being given to the vendee, there should not be any suit

(1) *Delafield v. Illinois*, 2 Hill. 159 (Amr.)

(2) *Delafield v. Illinois*, 26 Wend. 192 (Amr.)

(3) 4 Bouv. Inst. 128 (Amr.)

(4) *Weems v. Ventress*, 14 La. An. 267 (Amr.)

(5) *Ross v. Wright*, 12 Geo. 507 (Amr.)

(6) *Winn v. Wilkins*, 35 Miss. 186 (Amr.)

or other proceeding at Law or in Equity pending against O., whereby the title to the land of E. might be prejudicially affected, or if O. should, on the 21st of July, 1853, pay to E. £2000 with interest at 6 per cent., the obligation should be void; and T. commenced proceedings to obtain security upon the land before one year had expired, and O. failed to pay the £2000 on the 21st of July, 1853, but offered, a few weeks later, to do so, and this offer was rejected; and T., being declared entitled to an equitable mortgage upon the land, E. paid off her claims to an amount equal to that secured by the bond; the Privy Council—affirming the decision of the Court of Appeal, which had affirmed that of the Court below—held, upon a bill to restrain an action, and execution on, and delivery up of the bond, upon payment of the £2000 and interest, with costs of action, that he was entitled to enforce the bond against O. and his representatives to its full amount (1).

2. Where a plaintiff had entered into an agreement with C., who represented himself to be a solicitor acting for the owner of an estate, for the purchase of the estate, the purchase-money to be paid by means of certain bonds; and in pursuance of the conditions of sale one of the bonds was assigned to C. as deposit, and the remaining bonds were to be transferred upon the completion of the sale, but the contract turned out to be a fraud on the part of C., and was never carried out; and in the meantime C. assigned the bond to the defendant to secure an antecedent debt, and the defendant took it without notice of the fraud; the Court refused a motion to obtain the delivery up of the bond, and to restrain the defendant from assigning it (2).

3. The law does not favour general liens, and a general lien can only be claimed as arising from dealings in a particular trade or line of business—such as wharfingers, factors, and bankers—in which the existence of a general lien has been judicially acknowledged, or in other trades where there is express evidence of custom. And where G., a firm of London factors and merchants, were agents of L., a Hamburg firm; and G. purchased foreign bonds for L., to be held at L.'s disposal, and drew bills upon L. to balance the transaction; and, in reply to a letter advising these drafts, L. requested G. to keep the bonds in safe custody, and to

Assignee of a bond to secure antecedent debt, without notice of fraud by assignor, not restrained from assigning it.

The law does not favour general liens, and they can only arise where their existence has been judicially acknowledged, in particular trades, &c., or where there is express evidence of custom.

(1) *Osborne v. Eales*, 12 W. R. 654. (2) *Ashwin v. Burton*, 9 Jur. (N.S.) 319.

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Transferable bonds deposited as security for a loan to the owner—and obtained by owner upon representation that cheques given to redeem the bonds would be honoured—are chargeable with the loan.

give L. the numbers of the same until the bills were honoured, and after the bills were duly honoured, G. stopped payment; the Lord Chancellor Campbell, upon a bill filed to recover possession of, and to restrain the selling and disposing of the bonds, which the defendants retained on the ground that they had a lien on them for the general balance of their account with the Hamburg firm, held—reversing a decision of the Master of the Rolls, Sir J. Romilly, dismissing the plaintiff's bill—that G. had no lien upon the bonds for a general balance (1).

4. Where the defendant had commissioned a stockbroker to obtain a loan on security of bonds, transferable by delivery, which he deposited with him for that purpose, and shortly afterwards the broker obtained the loan from the plaintiff, a member of the Stock Exchange, and the defendant subsequently gave his brother the money to redeem the bonds, but he applied a portion of it to his own use, and was unable to redeem the bonds, of which fact he informed the defendant, and it was then agreed that the defendant should advance the broker a sufficient sum, by way of loan, to enable him to redeem the bonds; and that if the broker redeemed the bonds upon a particular day, the defendant would call and give him a cheque for the amounts to be advanced, and the broker gave the plaintiff his crossed cheque (upon the faith and in the belief that it would be honoured by means of the cheque to be given by the defendant), and the bonds were delivered up to him, and they were afterwards handed over to the defendant, but the defendant refused to give his cheque, and the broker's cheque was dishonoured; the Master of the Rolls, Lord Romilly, upon a bill filed for a declaration that the plaintiff was entitled to a charge upon the bonds, and for an injunction to restrain the defendant from parting with the bonds, held that the defendant was bound to make good to the plaintiff the representation which he had made to the broker, and upon the faith of which he had given his cheque to the plaintiff; and an account was decreed of what was due, and the defendant was directed to pay to the plaintiff the amount due upon the bonds, or, in default, the securities to be delivered up to the plaintiff; and in the meantime the defendant was restrained from parting with the bonds, and ordered

(1) *Bock v. Gorriessen*, 7 Jur. (N.S.) 81; 9 W. R. 209.

to pay the costs of the suit; and the Master of the Rolls held, that the plaintiff was not guilty of negligence in taking a crossed cheque, in accordance with the practice of the Stock Exchange, and delivering up the bonds, without first inquiring whether the broker had assets to meet the cheque (1).

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5. In *Fox v. Wright* (2) the Court relieved against *post-obit* bonds of a young man, put up to sale by him without reserve.

Post-obit
bonds sold by
young man
without reserve, relieved against.

6. In *Barker v. Vansommer* (3) the Court ordered a bond given for silks, taken up in order to sell and to raise money, to be delivered up upon payment of the sum really raised; Lord Chancellor Thurlow said, that he took it as an advancement of goods, instead of money, to supply the young man's necessities.

Bonds for
silks to raise
money, charge-
able only with
sum raised.

7. To set aside bargains at Law, fraud must be proved, but Equity relieves against presumptive fraud (4); and where S., a man of intemperate habits, aged thirty, in order to pay tradesmen's bills and other debts, for £5000 in hand, bound himself in the penalty of £20,000 to pay £10,000 upon the death of M., a lady aged seventy-eight, if he survived her, and M. died aged eighty-four, and S. survived her two years; and at M.'s death a new bond was entered into, with the same penalty, for the payment of £10,000 and interest, and S. executed a warrant of attorney to empower judgment to be recorded against him in the King's Bench, which was done accordingly, and £2000 were paid by S. in about five months from the death of M.; and before his death S. devised the residue of his personal estate, after paying debts, &c., to his son, a minor; and the plaintiffs, his guardians and executors in trust, brought a bill to be relieved against the defendant's demand as an unconscionable bargain and usurious contract, and for an injunction to restrain proceedings at Law until the hearing of the cause; the Court relieved the plaintiffs against the penalty and judgment, by directing the defendant to deliver up the second bond to be cancelled, and to acknowledge satisfaction on the judgment, upon being paid by plaintiffs what should be due at Law, but would not give the defendant costs against the plaintiff, as they

Equity re-
lieves against
presumptive
fraud.

A *post-obit*
bond given by
a man of
intemperate
habits re-
lieved against,
being upon an
unconscion-
able bargain
and usurious.

(1) *Mocatta v. Bell*, 24 Beav. 585;

27 L. J. (Ch.) 237; 4 Jur. (N.S.) 77.

(2) 6 Madd. 111.

(3) 1 Bro. C. C. 149.

(4) *Earl of Chesterfield v. Janssen*,

1 Atk. 352.

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had *probabilis causa litigandi*, and as trustees greatly to be commended for submitting a question of this nature to the Court, and defendant's case was far from entitling him to the favour of the Court (1).

Bonds with a penalty and condition not to demand wages until ship returned back to port — unjust and void.

8. Bonds taken by the captain of a ship, on an outward-bound voyage, from his seamen to himself, in £200 penalty, conditioned that they should not demand any wages until the ship arrived in the port of London; upon the ship being lost, and the seamen suing the captain for their wages, were held to be unjust and void in Law (2).

Weakness short of legal incapacity, is almost always a principal ingredient in cases of bonds, &c., set aside on ground of fraud, &c.

9. Although, in *Osmond v. Fitzroy* (3), Sir J. Jeckyl, Master of the Rolls, ruled that where a weak man gives a bond, if there be no fraud or breach of trust in the obtaining it, Equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis*; neither will this Court measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity (4); yet in *Griffin v. Devouille* (5), the Lord Chancellor observed, that in almost every case upon this subject a principal ingredient was a degree of weakness *short of legal incapacity*, and that in this very case of *Osmond v. Fitzroy* no relief would probably have been given if the Court had not considered Lord S. (the heir-apparent in that case, whose bond upon a cross bill to be relieved against the bond to an original bill to recover the money on the bond, on an allegation that it was mislaid, was set aside on the ground of fraud and breach of trust of the party who obtained it), as more liable to imposition than the generality of mankind.

10. Where the defendant found the plaintiff naked, and going to bed with his wife, drunk (as was suggested by the plaintiff), and the defendant took up an axe, and, under terror, the plaintiff gave him a note for £500, and this was in June; and in August the plaintiff gave the defendant a bond and judgment, and in October he surrendered a copyhold as a further security, and the plaintiff had told several persons that his debt to the defendant

(1) *Earl of Chesterfield v. Janssen*,
1 Atk. 301.

(2) *Buck v. Rawlinson*, 1 Bro. P. C.
138.

(3) 3 P. Wms. 130, 5th Ed.

(4) *Ib.*

(5) 3 P. Wms. 130, n. (1), 5th Ed.

was a bargain for grass; on a bill to set aside these securities, the Court refused to relieve further than against the penalties (1).

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11. Where one settled land upon his daughter in tail, and took a bond from her not to commit waste, the bond is not binding in Equity (2). And, *per Curiam*, it is an idle bond, and upon a bill to stay proceedings at Law upon the bond it was decreed to be delivered up, the defendants to pay the costs at Law and in the suit; and the Court said it was like *Pool's Case*, cited in *Tatton v. Mollenoux*, in Moore's Reports (809, 810), where a recognizance conditioned that the tenant in tail should not suffer a recovery, was decreed to be delivered up, as creating a perpetuity; and though in *Freeman v. Freeman* (3), where the father settled land upon his son in tail, and took a bond from him that he should not dock the entail, on a bill to be relieved against the bond by the issue of son, the bond was decreed to be good, for if the son would not have given the bond the father might have made him only tenant for life; yet it is submitted this case is not good Law.

A bond upon creating a tenancy in tail not to commit waste, is not binding.

12. Where a son, differing with his mother, a jointress, relating to the repairs of the mansion-house, settled the estate on his brother, but first took a bond from him, in his sister's name, that the brother should never suffer his mother to come into the house, the bond was decreed to be delivered up and cancelled, it being against the law of nature to prohibit a son to cherish his mother (4).

Bond not to suffer a mother to come into her son's house, decreed to be cancelled as against the law of nature.

13. A bond given as a remuneration to the obligee for having assisted the obligor in effecting an elopement and a marriage without the consent of the friends of the wife, was declared void, though given voluntarily after the marriage, and without any previous agreement for the same (5).

A bond in consideration of assisting in an elopement and marriage, without consent of wife's friends, is void.

14. A bond given as a reward for using influence over another's estate, for the benefit of the obligor, was decreed to be delivered up, but without costs, the plaintiff himself being *particeps criminis*, and having solicited to give the bond, and having got it prepared (6).

Bond in consideration of having used influence over another's estate, for obligor's benefit, to be delivered up.

(1) *Goodman v. Scuse*, Gilb. Eq. Rep. 9; 2 Eq. Abr. 183, pl. 2.

(4) *Traiton v. Traiton*, 1 Vern. 413, 414.

(2) *Jervis v. Bruton*, 2 Vern. 251.

(5) *Williamson v. Gihon*, 2 Sch. & Lef. 357.

(3) 2 Vern. 233; Prec. Ch. 28; see *contra*, 1 Eq. Abr. 87.

(6) *Debenham v. Oz*, 1 Ves. 277.

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Marriage
brocage bonds
will be set
aside.

Bond for pro-
curing admit-
tance as
purser in the
Royal Navy,
relieved
against, on
payment of
principal.
Bond in con-
sideration of
having pro-
cured an office
from the Com-
missioners of
Excise,
relieved
against.

15. Bonds in fraud of marriage agreements are set aside on public policy (1).

16. In *Smith v. Bruning* (2), a marriage brocage bond was decreed to be delivered up, and a gratuity of fifty guineas actually paid to be refunded; and in *Drury v. Hooke* (3) a marriage brocage bond was decreed to be delivered up, the marriage being had without the consent of the woman's parents. Such bonds are not to be countenanced; and in *Keat v. Allen* (4) a bond given to the wife's father in order to obtain his consent to the marriage of his daughter, to repay part of the portion if the daughter died without issue, where the daughter was entitled to her portion by a collateral ancestor, was set aside as a marriage brocage bond.

17. Where a bond had been given by A. to B., for B.'s procuring A. to be admitted purser to one of the King's ships, the Court relieved against the bond on payment of principal, but without interest or costs (5); but as to the disallowance of interest the law of that is questioned by Lord Mansfield and Lord Chancellor Loughborough in the cases in the note to the case (6). And where A., by his interest with the Commissioners of Excise, got an office in that branch of the revenue for his brother, B., who, in consideration thereof, gave a bond to A. to pay him £10 per annum as long as B. enjoyed the place, Equity will relieve against the bond (7). The Lord Chancellor (Lord Talbot) said that bonds and engagements of this nature were highly to be discouraged, and that merit, industry, and fidelity ought to recommend persons to these places, and not interest with the Commissioners, who, it was to be presumed, had they known from what motive the plaintiff at Law applied to them on behalf of his brother, would have rejected him: that the officer's giving money to a friend of the Commissioners for his interest was altogether as bad as giving money, or a bond for money, to the Commissioners themselves, which undoubtedly would have been relieved against; and that it was a fraud on the public, and would open a door for the sale of offices

(1) *Debenham v. Ox*, 1 Ves. 277.

(2) 2 Vern. 392.

(3) 1 Vern. 412; 2 Ch. Ca. 176;
S. P. Arundel v. Trevillian, 1 Ch.
Rep. 187.

(4) *Keat v. Allen*, 2 Vern. 588;

Anon. Prec. Ch. 267; *semb.* S. C.

(5) *Symonds v. Gibson*, 2 Vern. 308;

2nd Ed.

(6) *Ib.*

(7) *Law v. Law*, 3 P. Wms. 391.

relating to the revenue: that the taking away from the officer what the Commissioners and the Treasury thought to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion; and that though the excise was no part of the revenue at the time of making the statute of 5 & 6 Edw. 6, against the sale of offices, yet there must be good ground to construe it within the reason and mischief of that law, which was rather a remedial than a penal one: but that, supposing it to be a good bond at Law, so were all marriage brocage bonds, which yet are justly condemned in Equity as introductive of infinite mischief; and their having been much litigated and contested, fortified the opinion that prevailed at last, for it shewed what was the sense of the supreme Court of Judicature after the inconveniences of such bonds had been fully weighed and experienced. Wherefore, since engagements of this kind were likely to occasion corruption and extortion in offices, by having the profits of places separated from the places themselves, the Lord Chancellor directed the bond to be delivered up, and a perpetual injunction awarded thereon; and he decreed that, though this might be a new case, the defendant should pay costs. But where A. agreed to surrender his commission in the army to B. for £100, for which B. gave his bond, and B. was refused the commission, no relief was given save against the interest and costs, the defendant being ordered to accept of the principal money (1).

18. Where A., being a widow, gave a bond to pay B. £100 if she married again, and B. gave a bond to the widow to pay her executors the like sum if she should not marry again, and the widow soon after married, her bond was decreed to be delivered up, and also the bond from the defendant to the plaintiff A. (2).

19. If money be borrowed on a wife's estate for payment of her debts, and the husband at the same time gives a bond for payment of the amount, and he is afterwards sued on this bond for payment of the money, the Court will give him relief if he come to be repaid out of the wife's estate (3).

(1) *Berrisford v. Done*, 1 Vern. 98. 2nd Ed.

(2) *Baker v. White*, 2 Vern. 215, (3) *Lewis v. Nangle*, Ambl. 151.

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20. Where A. agreed to be bound in a bond as surety to B., and signed and sealed it accordingly, but by the neglect of the clerk A.'s name was not inserted, and the obligee shewed the condition, and his name and seal, demanded payment, and threatened to sue him unless he would give fresh security, which A. agreed to, but after finding the mistake refused, although not bound by Law, yet Equity will compel him (1).

21. Where a mother gave her son other lands in lieu of lands entailed, and by her will gave the entailed lands to her daughter, and took a bond from her son to permit her daughter to enjoy the entailed lands, and the son died leaving an infant son, who, being in possession of the lands that came in recompense, brought an ejectment of the entailed lands, and by reason of the infancy of the grandson the bond could not be sued; the daughter filed a bill, and was decreed to be quieted in possession of the entailed lands until six months after the infant came of age, and then the infant might shew cause (2).

Promissory
notes obtained
upon giving
bond by
infant, ordered
to be returned,
upon pleading
infancy.

22. Where a woman at the time of her marriage was indebted on two promissory notes, and after the marriage her husband gave his bond for the amount to the creditor, who thereupon delivered up the notes, and the bond having been put in suit, the husband pleaded his infancy at the time of giving the bond; on a bill filed in this Court for relief, the Court ordered the notes to be returned to the plaintiff, with directions that the defendant should not plead the Statute of Limitations to any action the plaintiff should bring on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given; but this Court would not order the immediate payment of the money (3).

Relief against
a verdict on a
bond not to
commit tres-
pass—the
trespass being
committed at
instance of
servants of
obligee.

23. In *Roy v. Duke of Beaufort* (4), a bill was filed against a judgment on a bond in which the plaintiff was jointly bound with his son in the penalty of £100, that the son should not commit trespass in the Duke of Beaufort's royalty by shooting, hunting, fishing, &c., except with the license of the gamekeeper, or in company with a qualified person; and the son having caught two flounders with an angling-rod, the bond was put in suit, and a

(1) *Crosby v. Middleton*, Prec. Ch. 309.

(2) *Thomas v. Gyles*, 2 Vern. 232.

(3) *Clarke v. Cobley*, 2 Cox, 173.

(4) 2 Atk. 190.

judgment obtained for the penalty. The gamekeeper's brother-in-law and another servant of the Duke having asked the plaintiff's son to angle with them, when he caught the two flounders, and the verdict having been found merely on their evidence, the Court (Lord Hardwicke) decreed that the plaintiff should be relieved against the verdict, and that the Duke should refund the £100 recovered on the bond, and the £40 damages; but gave no costs in this Court, on either side, on the ground, as to the Duke, that he did not appear to have the least knowledge of the circumstances of the case, being carried on merely by his agent, against whom costs in Equity would have been decreed had he been a party to the suit. Where the motives to an action are unjust, though the cause of action is just, a Court of Equity will always take this into consideration, though they cannot at Law pay any regard to it (1).

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If motive of action unjust, though cause of action just, Equity takes this into consideration, though Law cannot.

24. The Court allowed a demurrer to a bill, filed after a verdict at Law on a bond, praying discovery whether the consideration was not an agreement by the defendant to cohabit with the plaintiff as his wife, and whether the defendant was not guilty of general incontinence, and for delivery up of the bond, and an injunction to restrain the proceedings at Law; the Lord Chancellor observing that the necessity for the interposition of this Court was entirely taken away when all that matter that would have avoided the bond might have been pleaded at Law (for a bond in consideration of future cohabitation is void at Law), which had been done, but that the plea had not been supported, and the plaintiff's counsel alleged that no defence had been made beyond the plea; and the Lord Chancellor said that the plaintiff had no right to call upon the defendant to discover that turpitude which was common to him and to her, the defendant; and that he, the Lord Chancellor, could not compel her to discover whether before the connection she capitulated with the defendant for this provision, and that that would make her liable, not only to the reproach, but to the consequence of having lived in this illicit course of life (2). But a bond to secure a provision for a woman seduced by the obligor, and for her children, given by a man, though married at the time of the connection, to a woman after the cohabitation ceased to exist,

No discovery whether consideration of bond was not an agreement to cohabit.

Bond to secure provision for a woman and children after cohabitation, is good.

(1) *Roy v. Duke of Beaufort*, 2 Atk. 190. (2) *Franco v. Bolton*, 3 Ves. 368.

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A voluntary bond given to a prostitute, after keeping her, will not be relieved against.

Contra, if given previously to cohabitation.

is good (1); and a voluntary bond given by a person to the defendant, a common woman, after he had kept her two years, was not relieved against, upon a bill by the executor of the obligor (2). And the Lord Chancellor Camden said that he was clear in his opinion that the plaintiff was not entitled to relief; that the cases which had been determined against securities given to common prostitutes went upon the circumstance of the securities being given previous to the cohabitation, a consideration which, being *turpis* in its nature, the Court had relieved against them; that in this case the bond was not given for a consideration, but was voluntary; that Hill, the obligor, had resort to her for nearly two years before he gave her the bond; that past service could not be a consideration at Law, and nothing was stipulated for the future; that there was no principle in Equity which says a man may not give a voluntary bond to a common prostitute, and that it would be going but a little further to say that he could not give her money without her being liable to be called upon for it; that there was no circumstance of fraud in this case, and he did not think that in the case of a voluntary bond, the obligee being a common prostitute, is of itself a sufficient ground for relief. And in *Spicer v. Hayward* (3), where the plaintiff had seduced his wife's sister, and had had several children by her, and had given her some bonds for payment of money as a provision for her and her children, and these bonds being sued, he brought a bill suggesting that the bonds were given for no valuable consideration, the Court dismissed the bill with what the case calls "good costs."

25. Where A. had put his son apprentice to B., and given a bond for his fidelity, and taken a covenant from B. that he would, at least once a month, see his apprentice make up his cash, and the apprentice embezzled the cash, and B. brought an action on the bond; on a bill by A. to be relieved, the Court decreed that A. should be answerable for no more than B. could prove his apprentice had embezzled in the first month after the embezzlement began. The Lord Keeper said that the meaning of the covenant was, that defendant should not only see to the casting-up of his cash, that it

(1) *Knye v. Moore*, 2 Sim. & S. 260;
S. C. nom. *Knye v. Moseley*, 3 L. J.
(Ch.) 136.

(2) *Hill v. Spencer*, Ambl. 641.
(3) *Proc. Ch.* 114.

was right in figures, but should see the cash effectually made up; and that the bond and the covenant ought to be taken as one agreement, that the plaintiff would be answerable, provided accounts were taken monthly, and would be liable but for one month's embezzlement (1).

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26. A bond executed for a sum of money lost at billiards is void (2). And in *Rawden v. Shadwell* (3), where a bond had been given for money won at play, and a part of it paid, the Court ordered the money to be repaid, and relieved against the bond for the remainder. In *Woodroffe v. Farnham* (4), where one apprentice gave a bond to another apprentice for 50*l.* won at play, the bond was decreed to be delivered up, gaming among apprentices being of the worst consequence, and by the custom of London a master may justify turning away his apprentice if he frequents gaming (5). But where a bond executed for a sum of money lost at billiards had been assigned with the privity of the obligor, and upon his assurance that it was valid, and where he paid part of the money, and prevailed on the assignee to enter satisfaction upon the judgment obtained on the bond, and accept a new security for the remainder of the debt, Equity will not relieve him (6).

Bond for money lost at billiards, is void.
Bonds for money won at play relieved against.

But a bond for money won at billiards, will not (here) be relieved against—as against assignee, with privity of obligor and assurance—bond valid.

27. In *Taylor v. Bell* (7), where a woman resorted to places of gaming at Court, and borrowed money to supply persons of quality in their gaming, and gave the lenders great rewards and afterwards borrowed more, and was arrested for the last money lent, and gave a bond and judgment for it, and then brought a bill to have an allowance for the former excessive premiums which she allowed, the Court would not relieve otherwise than on payment of principal, interest, and costs at Law and in Equity, on the ground that the Court would not interfere or meddle with play-debts and things of that kind.

28. Where A., on his deathbed, desired his executor not to trouble B. for a bond debt, but the executor nevertheless put the

(1) *Montague v. Tidcombe*, 2 Vern. 518.

(2) *Kenny v. Browne*, 3 Ridg. P. C. 514.

(3) Amb. 269.

(4) 2 Vern. 291.

(5) *Vide* 5 & 6 Will. 4, c. 41: "An

Act to amend the Law relating to Securities given for Considerations arising out of gaming, usurious, and certain other illegal Transactions."

(6) *Kenny v. Browne*, 3 Ridg. P. C. 514.

(7) 2 Vern. 171.

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Equity will in some cases carry a debt secured by a bond, beyond the penalty.

Suit for penalty restrained, where only to secure collateral object. Suit for penalty restrained, where party will perform that for non-performance of which it is given.

bond in suit, the bond was ordered to be delivered up to be cancelled, and the costs of Law and Equity to be paid by the executor; but as to costs this decision was reversed (1).

29. Though Equity will in some cases carry a debt secured by a bond, beyond the penalty, as where a man is kept out of his money by an injunction, or is prevented from going on at Law (2), the creditor being restrained by an injunction obtained by the debtor from proceeding at Law, and there being no misconduct on the part of the creditor (3); yet (subject to such exceptions) where a man has judgment for the penalty of a bond, though the principal and interest exceed the penalty, he shall recover no more than the penalty (4). So, where the vendor of lands enters into a recognizance for the quiet enjoyment of the vendee, the Court will not go beyond the penalty, though the vendee's loss by eviction be greater (5). So, where a master of a ship covenanted to pay a penalty for all cloth carried in his ship, and in like manner bound his mate not to carry cloth under the penalty of £50, though the mate carried cloth to the value of £70 unknown to the captain, and the captain was obliged to pay the money, he could not, on his own application, charge the mate beyond the penalty (6).

30. Where the penalty of a bond is only to secure the enjoyment of a collateral object, Equity will grant an injunction against a suit for the recovery; and in *Sloman v. Walter* (7) an issue, *quantum damnificatus*, was directed to try the real damage; and Chancery will not suffer a penalty to be demanded if the party will perform that for the non-performance of which the penalty is given (8). And where the defendant had the plaintiff in execution, and refused to discharge him without payment of the penalty, the defendant was decreed to refund all he had received, except principal, interest, and costs (9), and sureties are relivable

(1) *Wekett v. Raby*, 2 Bro. P. C. 386.

(2) *Duval v. Terry*, Show. P. C. 15.

(3) *Grant v. Grant*, 3 Russ. 598.

(4) *Stewart v. Rumball*, 2 Vern. 509.

(5) *Bidlake v. Arundel*, 1 Ch. Rep. 95.

(6) *Davis v. Curtis*, 1 Ch. Ca. 226.

(7) 1 Bro. C. C. 418.

(8) *Hele v. Hele*, 2 Ch. Ca. 88.

(9) *Friend v. Burgh*, Finch, 437; v. 8 & 9 Will. 3, c. 11, s. 8, and 4 & 5 Anne, c. 16, ss. 12, 13, for relief at law from penalties: the first, for non-performance of covenants; the second, against the penalties of bonds.

against the penalties of bonds (1). And if a man agree not to do an act, and enter into a bond with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such act; but the Court will relieve by injunction until the actual damage sustained shall be ascertained by an issue (2).

31. Where the plaintiff was sued upon a bond at Law, and pleaded *solvit ad diem*, and by his bill in Equity he charged fraud and want of consideration, the Court relieved against the penalty, but decreed the principal, interest, and costs to be paid (3). And in *Earl Chesterfield v. Janssen* (4), where A., aged thirty, borrowed £5000 on a *post-obit* bond to pay £10,000, if he survived B., aged seventy-eight, and A. survived a year and eight months, no relief was given except as to the penalty; A. having, on the death of B., confirmed the bargain by a new bond, &c., freely; and the Court directed an account of the principal and interest due on the bond and judgment thereon. And in *Hill v. Caillovel* (5), upon a *post-obit* bond by A., aged twenty-four, in 1720, for payment in six months after his father's death, if he survived, otherwise to be void, and the father was then seventy, and died in 1731, and A. in 1734, Lord Chancellor Hardwicke gave no relief except against the penalty; there being no proof of imposition, although suspicious circumstances in it.

32. In a suit to set aside *post-obit* securities, upon an injunction being granted the principal and interest will be ordered into Court, and will not be paid out to the defendant (6).

33. Where A., intending to go a voyage, entered into a bottomry bond whereby the plaintiff was bound, in consideration of £400, as well to perform the voyage within six months as at the six months' end to pay the £400 and £40 premium in case the vessel arrived safe and was not lost in the voyage, but it fell out that the plaintiff never went the voyage, whereupon his bond became forfeited, and he filed his bill for relief; the Court decreed the defendant should lose the premium of £40, and be content with his principal and ordinary interest (7).

34. No interest will be allowed beyond the penalty of the bond

No interest
allowed be-
yond penalty

(1) Cary, 12.

(5) 1 Ves. Sen. 122, 4th Ed.

(2) *Hardy v. Martin*, 1 Cox, 26.

(6) *Mursack v. Farlow*, Jac. 572.

(3) *Duval v. Terry*, Show. P. C. 15.

(7) *Deguilder v. Depeister*, 1 Vern.

(4) 2 Ves. Sen. 125.

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of bond, except
special
grounds.

A bond
obtained by
undue
parental influ-
ence set aside.

except on special grounds (1). And in *Denny v. Lord Enniskillin* (2) interest beyond the penalty of the bond was not allowed to the assignee of a judgment, although he had been restrained by an injunction for a short time from proceeding at Law.

35. Where A., entitled to an estate, gave a bond to his counsellor, B., to give him half of it if he recovered, the bond was declared void; and although it is said in the case B. shall only recover his reasonable charges (3), yet now there is no right whatever of recovering them.

36. Where a father having advanced a child in his infancy, upon his coming of age took a bond from him to a greater amount than the sums advanced, the Court held that the bond had been obtained by parental influence, and decreed the bond not to stand as a security for the sums advanced, but to be set aside altogether; and loose expressions, in a letter from the son, were held not to be a confirmation (4).

37. Where A., having previously borrowed £1000 of B., executed to him a bond for that sum, and B., two days afterwards, executed a deed whereby he covenanted that the bond should not be enforced; and some years afterwards B., having become bankrupt, his assignees brought an action on the bond, and filed a bill to have the deed of covenant declared fraudulent; the Court held, that it would not interfere against the legal operation of the deed, there being nothing to shew that B. was insolvent when he executed it, and there being evidence that A. had, also, at that time, pecuniary claims on B., and that execution of the bond was accompanied by an agreement that payment of it should not be enforced (5).

38. In *Sleeper v. Carver* (6), bonds for resignation (being at that time considered legal) were held good where no improper use was made of them. But though bonds of resignation were not then prohibited by law, yet if they were made use of to extort money from the incumbent, or to turn him out for anything but

(1) *Clarke v. Seton*, 6 Ves. 411; (2) 2 Moll. 535.
S. P. *Ex parte Mills*, 2 Ves. Jun. 301; (3) *Skapholme v. Hart*, Ca. temp.
Grosvenor v. Cook, Dick. 305; *Gibson v. Egerton*, Id. 408; *Kettleby v. Finch*, 477.
Kettleby, and *Rundle v. Pettit*, Id. 338.
514. (4) *Carpenter v. Heriot*, 1 Eden.
(5) *Slack v. Tolson*, 1 Russ. 553.

(6) 2 Eq. Abr. 183.

ill behaviour or immorality, Equity would grant an injunction (1). In *Peele v. Capel* (2), upon a bond to resign in favour of the patron's nephew when of age, and at that time, instead of insisting on resignation, the incumbent agreed to pay £30 per annum for seven years, and stopped, the patron was restrained from suing on the bond; but the incumbent was left to his remedy at Law to recover back the money paid (3).

39. Where, in a suit for the administration of the assets of obligors in a common money bond, the Master, under an order of reference made by consent, enabling him to inquire into the consideration and all the circumstances relative to the bond, reported that it was a voluntary bond given as a bounty to the obligee; and the representatives of the obligors and the obligee took exceptions to the report, the former alleging that it was a bond of indemnity, the obligee claiming it partly for money advanced, and partly for services performed; the Court below refused leave to withdraw the obligee's exceptions, and directed issues to try whether the bond was given for money and services, or as a gift, or for indemnity. The House of Lords, on appeal, reversed that order, and remitted the case to the Court below to decide these questions on the evidence before it. The Court below decided accordingly upon a new hearing, and declared the bond to be partly for counter security, partly as gifts for services. The House of Lords, upon appeal, reversed that decision also, and ordered the Master's report to be confirmed; and the Court below subsequently, upon the hearing of the counter petitions, one presented by the representative of the obligee, praying payment of the bond and interest; the other by the representative of the obligors, praying for leave to institute a new suit to impeach the bond, on the ground that a gift from a principal to an agent was invalid in Equity; made an order for such

(1) *Hawkins v. Turner*, Prec. Ch. 513.

(2) 1 Str. 534.

(3) *v. 1 Bli. (N. S.) 148; et v. Bishop of London v. Ffytche*, 2 Bro. P. C. 211; Tom. Ed. Cunn. Sim. 52; deciding that general bonds of resignation are void. *Fletcher v. Lord Sondes*, 1 Bli. (N. S.) 144, deciding a special bond to resign

in favour of one of two particular persons was void. But see now 9 Geo. 4, c. 94, enacting that in certain cases an engagement before presentation, &c., to resign a benefice in favour of one person, or one of two persons specially named, should, in the circumstances there mentioned, be valid.

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suit, and granted an injunction against any proceedings on the bond in the meantime. The House of Lords, upon appeal, reversed that order, holding, that as the respondent omitted to take advantage of any of the opportunities of raising that objection to the bond in the preceding inquiries, it was not now competent to him to harass the other party by a new suit in which no new evidence could be produced (1).

Where receipts and payments are on both sides, and transactions complicated and no settled account—bond will only stand for the amount of the claim.

40. Where a plaintiff, while lodging at an hotel, and seriously ill, executed a bond to the landlord for £1000 payable at six months' date, to secure moneys paid and advanced for the plaintiff for hotel and other charges, the landlord undertaking to rectify all errors in the accounts; Vice-Chancellor Sir J. Stuart, upon a bill for an account, restrained an action on the bond, the plaintiff giving judgment for the amount of the claim, the receipts and payments being on both sides, and defendant, in his evidence, shewing a statement of complicated transactions, with receipts and payments on both sides, and no evidence that vouchers had been produced and signed to shew a settled account (2).

Bond to enable obligee to raise money passes to assignee for value, subject to subsisting equities in favour of obligor, unless upon its face it is made negotiable.

41. A bond given for the purpose of enabling the obligee to raise money passes to an assignee for value, subject to the subsisting equities in favour of the obligor, unless the intention with which it is given is expressed on the face of it (3). And where G., an officer, twenty-six years old, gave a bond for a £1000 to J., a barrister, thirty-two years old, without consideration, and at his instance wrote him a letter to the effect that the bond was given for the purpose of enabling J. to raise money; and G. testified that he thought that he was signing something for J.'s accommodation, and that J. would indemnify him; and J. afterwards told G. that G. was under no liability for him; but later he assigned the bond and gave the letter to B., who took *bonâ fide* and for value; and B. refrained from suing on the bond, on the strength of a promise by G. to pay as soon as he should come into certain property, G. not knowing his right to have the bond set aside; the Master of

(1) *Nicol v. Vaughan*, 1 Cl. & F. 495; 5 Bli. (N.S.) 505, reversing *Earl Winchelsea v. Garetty*, 1 My. & K. 253; 2 L. J. (N.S.) Ch. 115.

(2) *Edwards-Wood v. Baldwin*, 4

Giff. 613; 9 Jur. (N.S.) 1280.

(3) *Graham v. Johnson*, 38 L. J. (Ch.) 374; L. R. 8 Eq. 36; 17 W. R. 810; 20 L. T. (N.S.) 77.

the Rolls, Lord Romilly, held, that G. had a right to have both J. and B. restrained from suing on the bond; and that as against J. G. was entitled to have the bond cancelled; and that although G. gave the bond with the intention that it should be used as a negotiable instrument, yet that, as there was nothing on the face of the bond to shew such intention, B. took it subject to the equities between G. and J., and therefore could not be allowed to enforce it against G., a bond not being a negotiable instrument, although it may upon its face be made so (1).

42. Where B., for the purposes of a society of which he was the solicitor, borrowed £600 on the security of a joint bond entered into by himself and C., and the bond was conditioned to be void if the obligors, their heirs, executors, or administrators, should, within one month after the death of such one of three persons named in the bond as should first die, pay to the obligee £2000, and the bond also charged the interest to which the obligors might become entitled in any personal estate under the wills of the said three persons, with payment of the £2000; on the death of the last survivor of the three persons the obligors sought to be relieved of their obligation under the bond, on the ground that it had been entered into under circumstances which were inequitable, and that the whole transaction amounted, in fact, to a sale of a reversionary interest for an insufficient consideration; Vice-Chancellor Sir J. Stuart held that the bond was good (2).

SECT. 15. *Shipping—Shipments.*

1. The effect of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 70, 71, upon the *status* of a mortgagee of a ship is as follows:—It first declares that the mortgagee is not the owner, then that the mortgagor has not ceased to be the owner, then that the mortgagor shall be the owner, save so far as may be necessary for making the ship an available security for the mortgage debt (3).

(1) *Graham v. Johnson*, 38 L. J. (Ch.) 374; L. R. 8 Eq. 36; 17 W. R. 810; 20 L. T. (N.S.) 77; *v. Agra and* (2) *Gardner v. Couper*, 18 L. T. (N.S.) 627.

(3) *Collins v. Lamport*, 11 L. T. (N.S.) 391.

Masterman's Dunk Cuse, L. R. 2 Ch. 497; 11 Jur. (N. S.) 1; 13 W. R. 283; 34 L. J. (Ch.) 196; *v. pl. 11, post*.

Under ss. 70, 71, of Merchant Shipping Act mortgagee of ship is not owner —Mortgagor is owner, save as to the ship being available security for mortgage debt.

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Mortgagee restrained dealing with ship inconsistent with a beneficial charterparty.

Owner restrained employing ship inconsistently with charterparty, pending an inquiry.

Purchasers of ship with notice of a charterparty entered into by master duly authorized, restrained interfering with sailing of ship in pursuance of charterparty.

Therefore a mortgagor of a ship remaining in possession has full power to enter into contracts with respect to the ship, provided they do not impair the security; but the mortgagee may at any time enter into the benefit of such contracts by giving notice of his having required payment of his debt. And where R., the owner of a ship, having mortgaged it to the defendant, had contracted with L. for the sale of the ship to him, and before R. became finally bound by the contract L. entered into a charterparty with the plaintiffs, but before the vessel started on her voyage R. stopped payment, whereupon the mortgagees took steps towards selling the ship, it appearing that the terms of the charterparty would not damage the security; Lord Chancellor Westbury (reversing a decision of Vice-Chancellor Sir R. T. Kindersley) granted an injunction to restrain any dealings with the ship inconsistent with the terms of the charterparty (1).

2. In *Heriot v. Nicholas* (2), where a vessel had been chartered to convey a cargo of coals to China, and, having become damaged, the master was forced to discharge the cargo, and the owner declined to reship it, on the ground that having become wet it was liable to spontaneous combustion; on a bill by the charterers to restrain the owner from employing the ship in any manner inconsistently with the charterparty, the Lords Justices directed an inquiry as to the state of the cargo, and granted an injunction pending such inquiry. And where the master of an American vessel arriving in England, authorized by the owners to sell or charter the ship, entered into a charterparty with the plaintiff for a voyage to Ceylon and back, and a few days afterwards the defendant purchased the ship from a party acting under a power of attorney from one of the owners to sell her, and the greater part of the cargo had been put on board under the charterparty, and the defendant attempted to stop the sailing of the ship; Vice-Chancellor Sir W. P. Wood held, that the master having authority to charter the ship, which he had done, and the defendant knowing of the charterparty, an injunction would lie to restrain the purchasers from interfering with the sailing of the ship in pursuance

(1) *Collins v. Lamport*, 11 L. T. W. R. 283; 34 L. J. (Ch.) 196; *v. pl.* (N. S.) 497; 11 Jur. (N. S.) 1; 13 11, *post*.

(2) 12 W. R. 844.

of the charterparty (1). And the Court will restrain an owner of a vessel from doing any act inconsistent with a charterparty into which he has entered; and parties who have mutually bound themselves will be restrained from doing any act inconsistent with a charterparty which they have entered into *bonâ fide* (2). And although the Court of Chancery cannot decree the specific performance of a charterparty, yet it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charterparty (3). And although the Court will not affirmatively enforce the specific performance of a charterparty, yet it is implied in such a contract that if a charterer provides a cargo the ship shall not be employed for any other purpose; and a mortgagee with notice of a prior charterparty effected with the mortgagor will, in general, be restrained from doing anything to prevent its performance (4). Where, however, a mortgagor in such case was unable to put the ship in proper repair to make the voyage, or otherwise to perform the contract, and the charterer took no steps for several months with respect to it, the Court of Appeal held, that, under the circumstances, the contract was virtually at an end upon the mortgagee taking possession of the ship, and that the mortgagee ought not to be further restrained from exercising the powers contained in the mortgage (5). And where a shipowner entered into a contract to carry a cargo of coals from Birkenhead to Bombay, and the charterparty contained the ordinary exception of perils of the sea; and the ship, soon after sailing, was overtaken by a storm, and put into Belfast; and the master of the ship had the coals unshipped, and being advised that they were in too dangerous a state to be reshipped, he had them sold; and the charterers filed a bill to restrain the shipowner from using the ship in a manner inconsistent with the charterparty; Lord Cairns, L.J., held, upon an appeal from Vice-Chancellor Sir R. Malins, who had granted an injunction in those terms, putting the plaintiff upon an undertaking to provide a fresh cargo of coals, and indirectly

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Owner will be restrained doing acts inconsistent with charterparty—and parties mutually bound, restrained. Though Court does not affirmatively enforce specific performance of a charterparty, yet parties can be restrained employing ship inconsistent with it.

(1) *Messageries Impériales Company v. Baines*, 11 W. R. 322.

(3) *Le Blunch v. Granger*, 35 Beav. 187.

(2) *Sevin v. Deslandes*, 7 Jur. (N. S.) 837; 30 L. J. (Ch.) 457; 9 W. R. 218.

(4) *De Mattos v. Gibson*, 4 De G. & J. 276; 5 Jur. (N. S.) 347, 555.

(5) *Ib.*

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It is a general principle that a legal title in one country is good all over the world.

In acquiring legal title to moveables, the question may arise whether the *lex loci contractus*, or the law of the country where the parties are domiciled, or even the *lex loci rei sitæ* shall prevail—where all are combined, title is good all over the world. Courts (here) may disregard a foreign judgment *inter partes*:

1, where contrary to natural justice; 2, or based on domestic legislation not recognised by foreign countries; 3, or founded on misapprehension of law of this country; 4, or founded on refusal to recognise laws of country under which the title arose; 5, or if error appears on face of record.

compelling the ship to return to Birkenhead for that purpose, that no such injunction could be granted, on the ground that it compelled the plaintiffs to enter into an agreement which they had never entered into, while it forced the defendant to enter into the same agreement by putting a constraint upon him (1).

3. It is established as a general principle, that a legal title duly acquired in any one country is a good title all over the world (2). Duly to acquire a legal title to real estate, such legal title must be according to the *lex loci rei sitæ*. But the due acquisition of a legal title to moveables may give rise to the question whether the *lex loci contractus*, or the laws of the country wherein the contracting parties may be domiciled, or even the *lex loci rei sitæ*, shall prevail. However, where all these circumstances are combined in the acquisition of a legal title to a moveable, such title is, beyond doubt, good all the world over; and where assets are distributable, the order and disposition of such assets will be in accordance with the *lex fori* where such assets are distributable, but not where such assets are the produce of a chattel upon which a valid security has been given. And a judgment of a foreign Court is conclusive *inter partes* where there is nothing on the face of the judgment which a Court here can inquire into; but the Courts of this country may review and disregard a foreign judgment *inter partes* if it appears on the record: first, to be manifestly contrary to natural justice; secondly, or to be based on domestic legislation not recognised by foreign countries; thirdly, or to be founded on a misapprehension of what is the law of this country; and fourthly, or to be founded upon a distinct refusal to recognise the laws of the country under which the title to the subject-matter of litigation arose; and the same rules apply to judgments of colonial Courts. And a foreign judgment may be reviewed by the Courts of this country if any error appears on the face of the record; therefore, where a ship, the property of British subjects, had been duly mortgaged in Great Britain to other British subjects, and being in the mortgagors' possession proceeded to New Orleans, and whilst there it was attached by creditors of the mortgagors, resident in New Orleans, and after due intervention and hearing of the British mortgagees

(1) *Adamson v. Gill*, 16 W. R. 639,
306; 18 L. T. (N.S.) 278.

(2) *Simpson v. Fogo*, 1 H. & M. 195;
11 W. R. 418.

before and by the Courts of Louisiana, sold under process of the Court, to satisfy the attaching creditors, to a British subject, who had notice of the mortgagees' intervention; on a bill by the mortgagees against the purchaser, the defendant Fogo and the consignee and the captain of the ship, alleging that the defendants, the consignee and the captain, intended to pay the freight already accrued to the defendant Fogo, and that Fogo intended to dispose of the ship, and send her away from Liverpool (to which place Fogo had sent the ship with a cargo, and, on its arrival, had had it registered there), without regard to the claims of the bank, the mortgagees; and praying an injunction to restrain the defendants from allowing the ship to leave Liverpool, and from dealing with her without the consent of the bank, and also from collecting the freight; and that a receiver might be appointed to collect the freight; and for a declaration that the Bank of Liverpool was entitled to the ship and freight, subject only to any disbursements properly payable thereout; Vice-Chancellor Sir W. P. Wood held, that the sale was subject to the right of the mortgagees; and that the judgment of the Court of Louisiana was examinable for error on the face of it by reason of its disregard of the comity of nations; and that the mortgagee was entitled to the ship and freight, subject to a prior lien in respect of sums paid to privileged creditors; and also that the judgment was of the nature of a judgment *inter partes* as regarded the intervenor; and, *semble*, that a foreign judgment, even *in rem*, may be examined and disregarded, if it appears on the face of it to have been founded on a perverse disregard of English law, in a case properly subject to that law by the comity of nations (1). But where the owner of a British ship having mortgaged it in England, employed a Liverpool firm to consign it to their agents at New Orleans, and as the New Orleans firm happened to be creditors of the owner, the Liverpool firm, in consideration of their having the consignment, instructed their agents not to proceed against the ship at New Orleans, but to remit the proceeds to the mortgagees; and afterwards, the Liverpool firm getting into difficulties, some of the mortgagees insisted on the consignments being changed, and the Liverpool firm withdrew their instructions; and when the ship arrived the New Orleans firm

(1) *Simpson v. Fogo*, 1 H. & M. 195; 11 W. R. 418.

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brought actions in their Courts against the owner ; and as the Courts of Louisiana do not recognise the rights of mortgagees without possession, writs of attachment were obtained, under which the ship was seized ; and the mortgagees then, to prevent the ship being sold, gave to the New Orleans firm bonds for the amounts to be recovered in the actions, upon which the ship was released ; and the mortgagees filed a bill to restrain the holders of the bonds from suing on them in New Orleans or elsewhere, and to have the bonds delivered up ; Vice-Chancellor Sir W. P. Wood held, upon a demurrer, that the Court had no jurisdiction to stay proceedings on the bonds ; first, because the Court would not have restrained execution of the attachment at New Orleans, as it could not have placed all the creditors, foreign and domestic, on an equal footing, and it would have given an advantage to the American creditors to which they were not entitled ; secondly, because if it could have done so, the mortgagees should not have placed themselves in a lower position by giving the bonds, but should have come into the English Court of Equity in the first instance to have restrained the attachment ; and the Vice-Chancellor said, further, that by acceding to the prayer of the bill he should be placing British subjects in a position in which it would be impossible for them to get their ships released at all (1). And this decision was affirmed by Lord Chancellor Chelmsford, who held that though the transfer of personal property must be regulated by the law of the owner's domicile, and that the disregard of that law by the Courts of a foreign country is an infraction of the comity of nations which justifies the Court of Chancery in decreeing a restitution, as in *Simpson v. Fogo* (2), upon the property coming within its jurisdiction ; yet, that if a creditor pursues the chattel of his debtor to a foreign country in which he knows that the rights of a third party will be disregarded, this Court cannot interfere to restrain the proceedings taken by the creditor in the foreign country (3).

Disregard of the law that the transfer of personal property is regulated by domicile, is an infraction of the comity of nations, and justifies Chancery in decreeing restitution. But if creditor pursues a chattel to a foreign country where he knows the rights of a third party will be disregarded, this Court cannot interfere.

4. Where P. & Co., being registered mortgagees of vessels, de-

(1) *Liverpool Marine Credit Co. v. Hunter*, L. R. 3 Ch. 479; 16 W. R. 1090; 18 L. T. (N.S.) 749; 37 L. J. (Ch.) 386.

(2) *Ante*

(3) *Liverpool Marine Credit Co. v.*

posited on the 20th of December, 1858, before bankruptcy, the instruments of mortgage with their bankers to secure the amount of an overdrawn account; and on the 22nd of December two cheques were presented by P. & Co. for payment, but the bankers refused to pay them; and thereupon a bill of sale was executed by P. & Co. of their goods and effects to secure the balance due, and further advances; and on the 23rd of December the bankers paid the cheques, but transfers of the mortgages were not executed to the bankers; and on the 28th the bankers sold under the bill of sale some of the effects; and on the 30th P. & Co. were adjudicated bankrupts; upon a bill by the bankers for an injunction to restrain the sale by the mortgagor of the vessels, and an action at law against the plaintiffs for the conversion of the chattels sold under the bill of sale; and for declarations that the giving and executing the bill of sale was not an act of bankruptcy then committed by P. & Co.; and that the plaintiffs had a lien upon the vessels and the proceeds of the same in respect of the equitable deposit of the mortgages; and that the defendants, the assignees, might be directed to join in proper transfers of the mortgage securities to the plaintiffs; Lord Chancellor Westbury held (affirming the decision of Vice-Chancellor Sir J. Stuart), that the bill of sale, being an assignment of all the trader's property as a security for an antecedent debt, as well as for future advances, was an act of bankruptcy, and the bill in that respect was dismissed with costs; but that the deposit of the instrument of mortgage took the ship out of the order and disposition of the bankrupt, and constituted the creditor equitable mortgagee of the ship, and a decree on this point was made in favour of the plaintiffs, with costs (1).

The deposit of instrument of mortgage of ship takes the ship out of the order and disposition of mortgagor, and constitutes the creditor equitable mortgagee of the ship.

5. Where by an agreement in 1861, but not executed till the 11th of April, 1862, shipbuilders had agreed to build a schooner for F., and on the 12th of April the agreement was assigned to the plaintiff to secure £500 already advanced to them for the purpose of enabling them to complete her, and future advances up to a certain amount; and the vessel was assigned to the plaintiff to be held by him in lien for such advances and interest; and on the 19th of May the agreement between the builders and F. was put an end to; and on the 20th they entered into a new contract with

(1) *Lacon v. Liffen*, 9 Jur. (N. S.) 477; 32 L. J. (Ch.) 25, 315; 4 Giff. 75.

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the plaintiff to complete and sell the vessel to him for £1160, of which the advanced £500 was to be taken as part payment; and no registration of the vessel ever took place, but on the 20th of May the builders certified, according to the provisions of the 17 & 18 Vict. c. 104, that they had built the schooner for the Plaintiff; and the advances did not appear to have been laid out exclusively upon the vessel; and before the 20th of May the builders had discharged their workmen, and were virtually insolvent, though this was not proved to have been brought to the plaintiff's knowledge; and the vessel was unfinished on the 2nd of June, when they were adjudicated bankrupts, and on the 19th the defendants were chosen assignees; on a bill to support and enforce the lien as to the instrument of the 12th of April, praying for a declaration that the plaintiff was entitled to a lien upon the ship, and that the defendants might be decreed specifically to perform the agreement of the 20th of May by completing the vessel themselves, or permitting the plaintiff to do so, and that they might be restrained from selling, mortgaging, or otherwise dealing with the vessel, the Court held that the lien under the 12th of April was destroyed, if not by the cancellation of the agreement with F., yet by the fact that the £500 thereby secured was merged into, and taken as part payment of the purchase-money, under the agreement of the 20th of May; but as to the memorandum of the 20th of May, the Court held that under it the plaintiff was entitled to a lien on the unfinished ship for the £500 actually advanced, and also that no registration under the Bills of Sale Act (17 & 18 Vict. c. 36), was necessary, and that the vessel was not within the order and disposition of the builders at the time of their bankruptcy (1).

Master of ship has no lien on ship or freight for wages or expenditure as master. But if master makes a special contract *ultra vires*, if owner adopts the benefit of

6. A master of a ship has no lien on the ship or freight for wages, or for any expenditure which he may make in the ordinary discharge of his duties as master, however necessary for the performance of the voyage. But the case becomes one of ordinary principal and agent where he makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses; if the owner adopts the benefit of that contract he must, in Equity, also adopt the benefit of contract he must bear its burthens.

(1) *Swainston v. Clay*, 11 W. R.301, 811; 8 L. T. (N. S.) 363.

bear its burthens (1). Where, therefore, the master of an ordinary seeking ship, in April, 1856, entered into a charterparty under seal, therein describing himself as commander and owner, to carry troops from the Mauritius to England, and stipulated, on his own responsibility, in the charterparty, that he would make certain alterations in the ship in order to enable him to carry the troops; and at the Cape of Good Hope, one month later, entered into another charterparty, not under seal, to a similar effect, and made the specified alterations, and paid money and drew bills to meet the expenses necessary to the making of these alterations; and the voyage was performed; and in October the owner became bankrupt, having previously mortgaged the vessel to R. & F., who, upon its arrival in the Thames, seized it; and the bills drawn by the master upon the owner were dishonoured, and the master, the plaintiff, as the drawer, was threatened with actions upon them by the holders; upon a bill by the master against the assignees of the owner, and R. & F. (the Commissioners of the Admiralty on whose behalf the charterparties had been entered into, having paid the amount of the freight into Court), the House of Lords, reversing a decision of Lord Chancellor Campbell, and affirming that of Vice-Chancellor Sir W. P. Wood, held that in Equity the master was first entitled out of the freight earned under these charterparties to be repaid the sums advanced, and to be indemnified against the bills, and that the owner (or his mortgagee) was only entitled to the net freight after deducting these charges (2).

7. A master of a ship who, having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owner's account, and being unable to procure remunerative freight; loaded the ship with a cargo of his own; was, upon a bill by the owners of the ship against the late master for an account, and to charge the defendant with the profits of the cargo, and for an injunction to restrain proceedings at Law, or in the Court of Admiralty, (an interim injunction having been obtained,) at the hearing by Vice-Chancellor Sir W. Page Wood, held liable to account to the owners for all profits made by the sale of the cargo, and not merely for a proper freight; and the general principle that

Master loading without authority, with a cargo of his own, is liable to account for profits of sale.

(1) *Bristow v. Whitmore*, 9 H. L. C. 391; Joh. 96; 28 L. J. (Ch.) 801.

(2) 1b.

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Seemle, mortgagee of ship taking possession is entitled to use her.

a trustee cannot make a profit for himself by the use of the trust property applies to an agent intrusted with a ship or other chattel for the purpose of using it for the owners' benefit (1).

8. In *De Mattos v. Gibson* (2) Vice-Chancellor Sir W. P. Wood intimated his opinion to be that a mortgagee of a ship taking possession of her is entitled to use her and sail her, and upon doing so becomes an owner within the meaning of the Merchant Shipping Act, 17 & 18 Vict. c. 104, and subject to all the liabilities consequent thereon; and consequently that where a mortgagee of a ship is improperly restrained by injunction from using the vessel, the plaintiff giving the usual undertaking as to damages, the Court, in dealing with the undertaking, will take into consideration the loss of profit arising from non-user. But where such an injunction had been granted against a mortgagee who had declared his intention to sell, and who had not suggested loss by non-user as part of his case against the injunction, the Court held that the loss of such profit was too speculative to be taken into account, and limited the amount of damage to the expense of keeping the ship, and, the security being insufficient, the deterioration she had consequently suffered, together with interest in the meantime (3). And so, in another case (4), the same Vice-Chancellor intimated his opinion to be that a mortgagee of a ship has power under the 70th section of the 17 & 18 Vict. c. 104, to use the ship for the purpose of navigating her, as well as to sell the ship. But where a mortgagee claimed under a special contract which did not contemplate a sale by him until two months had elapsed after a demand for payment, Vice-Chancellor Sir W. P. Wood held, upon the construction of the agreement, and especially having regard to the circumstance that the ship would otherwise remain useless in that interval, that he was at liberty to use the ship; and in such a case the circumstance of the mortgagee being registered as absolute owner is not conclusive as to the rights of the parties (5).

Mortgagee of steamship taking possession

9. Where a mortgagee of a steamship took possession of her

(1) *Shallcross v. Oldham*, 2 J. & H. 609.

(2) 1 J. & H. 79; 7 Jur. (N. S.) 282.

(3) *Ib.*

(4) *European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.* 4 K. & J. 676.

(5) *Ib.*

and used her for the purposes of a speculation which resulted in a loss, and subsequently sold her disadvantageously; the Court of Appeal held, affirming a decision of Vice-Chancellor Sir John Stuart, that he must himself bear such loss, and be charged with the value of the vessel at the time he took possession of her (1).

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sion and using in speculation resulting in loss, must bear loss, and be charged value at time of taking possession.

10. The Merchant Shipping Acts Repeal Act of 1854, 17 & 18 Vict. c. 120, did not repeal, but only modified or limited the 9 & 10 Vict. c. 93, so far as the latter created liability for the loss of life by collision at sea; and by the joint operation of the 9 & 10 Vict. c. 93, and the 25 & 26 Vict. c. 63, the liability of the owner of a sailing vessel for loss of life occasioned by collision with another vessel at sea is limited to £15 per ton of the registered tonnage of his vessel; and the liability of a shipowner in respect of loss of life to the seamen of a vessel run down by his ship is not limited to £30 for damages payable in each case of death; and this rule applies to all cases, whether the Board of Trade does or does not institute proceedings in respect of such loss of life; and where the damage sustained by all the claimants exceeds in the aggregate the whole amount for which the shipowner is liable (viz., at the rate of £15 per registered ton of his ship) the fund must be distributed rateably amongst all the claimants in proportion to the damages sustained by them respectively; but where the whole amount of damages is less than the whole amount for which the shipowner is liable, the amount of damages sustained by each claimant is to be paid in full; so held upon a bill by the owners of a ship which had come into collision with another vessel and sunk her, and eight out of ten of the crew were drowned, against the owner of the sunken vessel, the personal representatives of such as had any, and the owners of the cargo, praying that the amount of the plaintiffs' liability in respect of the above matters, according to the Merchant Shipping Amendment Act, 1862, might be declared and distributed between the defendants and all other persons who should establish claims against the plaintiffs in respect of the above matters under the direction of the Court; and that in the meantime the defendants might be restrained from the actions

By joint operation of 9 & 10 Vict. c. 93, and 25 & 26 Vict. c. 63, liability of owner of sailing vessel for loss of life on collision, is limited to £15 per ton of vessel, and not to £30 in each case of death.

If damage exceeds aggregate of whole amount for which owner liable, the fund must be distributed rateably.

Prayer of bill to settle amount of liability arising from loss of life on collision of vessels.

(1) *Marriott v. Anchor Reversionary Co.* 2 Giff. 457; 7 Jur. (N. S.) 713; 39 L. J. (Ch.) 122, 571.

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If mortgagor of ship does act prejudicing security, mortgagee may exercise his powers subject to contracts entered into by mortgagor in possession—but such contracts enure for benefit of mortgagee on his giving notice—and mortgagees restrained dealing with ship inconsistent with beneficial charterparty entered into by purchaser from mortgagor.

A part owner, who is ship's husband, cannot, as against the other owners, make an assignment of the whole freight. The legal right to receive the freight is in the captain.

already commenced, and from commencing any other actions against the plaintiffs touching the above matters (1).

11. Where a mortgagor of a ship does some act which prejudices or injures the security of the mortgagee, the declaration in the 17 & 18 Vict. c. 104, ss. 70–71, that the mortgagor is to be deemed the owner, ceases to have any binding effect against the mortgagee; and he may exercise the powers given to him by the mortgage, subject to this qualification, every contract entered into by the mortgagor in possession is a contract which derives validity from the declaration contained in the statute of his continuing to be the owner. Such contract would, however, enure for the benefit of the mortgagee on his giving notice to the party who is to pay the mortgagor under that contract. Therefore where, pending a mortgage, the mortgagor had contracted for the sale of the ship, and before the contract was completed the purchaser had entered into a beneficial charterparty with the plaintiff; the mortgagees, on the bankruptcy of the mortgagor, were restrained from selling or otherwise dealing with the ship in any manner inconsistent with the terms of the charterparty (2).

12. A part owner who is a ship's husband has not the right, as against other part owners, of making an assignment of the whole freight to secure moneys advanced to him, and the legal right to receive the freight is in the captain; and, in the absence of sufficient allegation and proof that he is about to misapply it, the Court of Appeal held that no injunction ought to have been granted, and dissolved the injunction mentioned below, upon the captain undertaking not to apply the freight to any other than the proper purposes; so held in a case where S. & Co. were owners of seven-eighths of an American vessel, and ship's husband, and T. was owner of the remaining eighth, and was captain of the vessel, which was despatched on a voyage to Liverpool; and before the voyage S. & Co. spent a large sum in repairs, and, for the purpose of taking up bills which they had accepted on account of the repairs, (which were afterwards dishonoured,) they borrowed a sum of money from W. & Co., and assigned the whole freight to

(1) *Glaholm v. Barker*, L. R. 1 Ch. (N. S.) 1; 13 W. R. 283; 34 L. J. 223; L. R. 2 Eq. 598; 34 Beav. 305. (Ch.) 196, v. pl. 1, *ante*.

(2) *Collins v. Lamport*, 11 Jur.

arise from the ship's next voyage to them by way of security, and on the arrival of the vessel in Liverpool the plaintiff, to whom the order assigning the freight had been remitted by W. & Co., obtained an injunction to prevent T. from receiving the freight (1).

13. Upon a bill filed by the owners of a ship having caused a collision, for the purpose of having their liability under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 504), ascertained, and to restrain proceedings in the Admiralty Court against the vessel, Vice-Chancellor Sir W. P. Wood held, that where damage is done by a ship both to persons and goods, the ship is to be estimated at not less than £15 per ton, for the purpose of adjusting the compensation to be paid to claimants in respect of loss of life or personal injury (2); but that where all demands in respect of personal injury or loss of life have been settled, and the only claimants against the ship are the owners of property which has been damaged, the ship is not to be estimated at more than her actual value, notwithstanding the fact that loss of life or personal injury has occurred; and that where claimants of both kinds appear, the owners of property are entitled to have the compensation for loss of life and personal injury marshalled, so as to throw it primarily on the excess (if any) of the value at £15 per ton over the actual value of the ship (3).

Where claims in respect of loss of life or personal injury are settled, ship is only estimated at actual value as regards claims by owners of property. Owners of property injured, entitled to have compensation for loss of life, &c., marshalled, to throw it on excess of value at £15 per ton, over actual value.

14. Where a British ship had come into collision with a foreign vessel within three miles of the English coast, causing loss of life to those on board, and complete destruction of the ship and cargo of the foreign vessel; upon a bill by the registered owners of the British ship to obtain the benefit of the limitation of the liability prescribed by the Merchant Shipping Act, 1854; and praying that the value of the ship, and amount of the claims against her, might be ascertained, and the value apportioned; and that proceedings in the Admiralty Court by the owners of the ship sunk, and of her cargo, might be restrained, judgment having been given there against the plaintiffs in damages and costs, which had been affirmed by the Judicial Committee of the Privy Council; and the

Owner of British ship is only answerable to extent of value as against owners of foreign ship and cargo.

(1) *Guion v. Trask*, 1 De G. F. & J. 373; 3 Jur. (N. S.) 185.

(2) *Nixon v. Roberts*, 1 J. & H. 739.

(3) *Ib.*

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ship having been arrested to enforce the judgment, and bail given to answer the said actions; Vice-Chancellor Sir W. P. Wood held, that the sections of the 17 & 18 Vict. c. 104, part 9, applied, and that the owner of the British ship was only answerable to the extent of the value of such British ship as against the owners of the foreign ship and cargo, although the owners of the foreign ship had proceeded in the Admiralty Court, and recovered damages for the value of the foreign ship and her cargo (1).

Interest is payable upon the sum payable as damages.

15. The owners of a ship causing a collision are liable to pay interest upon the sum payable as damages, although such damages may amount to the maximum sum limited by 25 & 26 Vict. c. 63, s. 54, and if the ship injured is in ballast at the time of the accident such interest will be calculated from the date of the collision (2).

Though bill of sale of ship is registered, yet if registry invalid, no title is given to the person registered.

16. Under the 17 & 18 Vict. c. 104, s. 79, the registry of a bill of sale which, though purporting to be valid, so that the registrar has no alternative but to register it, is in fact invalid, gives no title, even at Law, to the person thereby registered as sole owner of the ship (3); therefore, where a bill of sale—though executed by the person named for that purpose by the plaintiff, the then owner of the ship, and purporting in all other respects to be made in conformity with the certificate of sale—was, in fact, made for less than the minimum price specified in the certificate, and the ship was registered in the name of the purchaser as sole owner; upon a bill by the owner of the vessel, charging that no *bonâ fide* sale of the vessel had ever taken place, and praying that the defendants might be restrained from dealing with the vessel and detaining her documents, and from causing her to be registered, except for the benefit of the plaintiff, and that the vessel and her documents might be delivered up to the plaintiff, and the plaintiff having obtained an interim injunction, and afterwards an injunction till the hearing; Vice-Chancellor Sir W. P. Wood, upon the hearing, held that the registry was void; and the ship having been sold by arrangement pending a suit, that the plaintiff was entitled to the net proceeds of the sale (4). And where a person having no

A person having no title

(1) *General Iron Screw Collier Co. v. Schurmanns*, 1 J. & H. 180; 4 L. T. (N. S.) 188; 8 W. R. 732. (2) *Straker v. Hartland*, 34 L. J. (Ch.) 122; 11 L. T. (N. S.) 622. (3) *Orr v. Dickinson*, Joh. 1.

(4) *Id.*

title to a ship procures it to be registered in his name, the Court will compel him to retransfer it to the rightful owner, and account for the earnings, even though there has been no fraud, and notwithstanding the 17 & 18 Vict. c. 104 (1).

17. The policy of the Ship Registry Act (8 & 9 Vict. c. 89), in disregarding interests not appearing on the register, is inapplicable both to the money arising from the sale of a ship, and to the produce of the freight; and where a party who appears on the registry to be the absolute owner of a ship, enters into an agreement for valuable consideration, admitting he is a trustee, and engaging to sell the ship, and hand over the produce to the true owner, the Court, notwithstanding the 8 & 9 Vict. c. 89, ss. 34-39, will enforce the agreement; and where shares in a ship, purchased with A.'s money, were registered in B.'s name, and after A.'s death B. had entered into an agreement with his representatives admitting their right, and, for valuable consideration, agreeing to sell the shares at the end of twelve months, and to account to the representatives for the proceeds, and B. accordingly sold to C.; the Master of the Rolls held, that though the 8 & 9 Vict. c. 89, prevented the representatives enforcing any right against the ship itself, still that they were entitled to recover the purchase-money in the hands of C. (2). And in this case, between the date of a bill of sale of shares of a ship and the entry of the transfer on the register, the purchaser having had notice that the vendor, though the shares were registered in his name, was a trustee, and the case presenting a *prima facie* appearance of fraud, and the purchaser registering it in his own name, and admitting that he was indebted to the vendor for the price of the vessel, but having submitted in his answer to apply the amount as the Court should direct; the Court granted an interim injunction to restrain the purchaser from dealing with the shares or indorsing the transfer on the certificate of registry, so as to insure the effective determination of the questions at the hearing (3).

18. The Ship Registry Act, 8 & 9 Vict. c. 89, does not prevent a lien being created on the certificate of original registry of a ship

to ship will be compelled to retransfer to the rightful owner.

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The policy of Ship Registry Act in disregarding interests not appearing on the register, is inapplicable to sale-moneys of ship sold, and to produce of freight.

Cestuis qui trust are entitled to the purchase-money of ship sold by their trustee, appearing as absolute owner on registry.

And injunction granted (here) to restrain purchaser dealing with the shares of ship.

The Ship Registry Act does not prevent a lien

(1) *Holderness v. Lamport*, 29 Beav. 129. Beav. 78: 1 Jur. (N. S.) 859; 24 L. J. (Ch.) 659.

(2) *Armstrong v. Armstrong*, 21 (3) 1b.

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being created on the certificate of original registry of ship deposited by unregistered owner as a security for advances for the ship.

A party who without title gets registered as owner can be restrained from prosecuting a complaint for refusing to deliver certificate.

Where a bill of sale of shares of ship shewed by indorsement it was not absolute, but as a mortgage—but the registry was of an absolute sale; upon a bill by the, original owner to redeem, the Court restrained a purchaser from the assignee registering his bill of sale, and made a decree for redemption.

deposited by an unregistered owner to secure advances for the use of the ship, and upon a motion by the plaintiff claiming such a lien, a party who, without a lawful title, had procured himself to be registered as owner of a ship, was restrained by Vice-Chancellor Sir W. P. Wood from prosecuting a complaint made under sect. 30 against the plaintiff for wilfully detaining and refusing to deliver up the certificate of the ship's registry, and from instituting any other proceeding against the plaintiff to compel him to deliver up the certificate (1).

19. Where the owners of eight sixty-fourths of a vessel, in consideration of £100, assigned them by bill of sale, and contemporaneously with its execution a memorandum was indorsed thereon, signed by an agent of the assignee, stipulating that on the assignor repaying to the assignee the £100 and interest the bill of sale should be void; and subsequently the assignee received interest and gave a receipt for it, as for interest on £100 advanced on security of the bill of sale; but the registry at the custom house was of an absolute sale; and the assignee sold the eight sixty-fourths, and the bill of sale to the purchaser was duly executed, but before its registry a bill to redeem by the original owner was filed; the Court restrained the registry of the bill of sale, and made a decree for redemption on payment of the £100 and interest, with costs so far as they were increased by the dispute of the plaintiffs' right to redemption (2). And where the owner of six ships, by a deed to which he and two trustees alone were parties, and which was duly registered, assigned them to two trustees for securing sums of money expressed to be lent to him by them (but which had been, in fact, lent by the plaintiffs), and covenanted to insure each vessel in the sum of £1500 at the least, and on request to assign the policies to the trustees; and he did insure the ships in his own name, through the agency and in the name of a broker who had notice of the mortgage, but who had been informed by the owner that insurances had been effected by the trustees in respect of their interest, and who trusted him in the belief that the insurances were on the

(1) *Clarke v. Batters*, 1 K. & J. 242.

(2) *Whitfield v. Parfitt*, 4 De G. & Sm. 240.

owner's own account, in respect of his interest as mortgagor; and one of the ships insured in £1000 was lost; and the owner subsequently became bankrupt; and the broker was a creditor of the owner for premiums on the insurance policies, and for £100 cash advanced after the policies had been effected, and he brought an action against the underwriters for the moneys secured by the policies; in a suit by the plaintiffs, who had really lent the money on the mortgage security, against the broker, the underwriters, and the trustees for the plaintiffs, asking a declaration that the proceeds of the policies belonged to the plaintiffs, and for an account and injunction; the Court held, that the provisions of the Ship Registry Act afforded no defence to the suit, and that the broker was not entitled to a general lien for the whole balance due to him from the bankrupt, but only on each policy for the sum paid in respect of that policy, and that the assignees had no title under the order and disposition clause in the Bankruptcy Act (1).

20. Upon a bill for specific performance of an agreement for the sale of forty sixty-fourth shares in a ship, praying that the defendants might be decreed to execute a bill of sale of the shares in question to the plaintiff upon the payment by him of the balance of the purchase-money, and for an injunction to restrain them from selling the shares, and for compensation in respect of the damage to the plaintiff by the arrest and detention of the ship; the Lords Justices held, that a contract for the sale of shares in a British vessel not reciting the certificate of registry could not be enforced in Equity (2). And in *McCalmont v. Rankin* (3), upon a bill praying, among other things, that certain parties, defendants, might be decreed to execute a bill of sale of a vessel, and for an injunction to restrain the master from parting with the ship, papers, and cargo, and to restrain certain other defendants from taking possession of the ship, papers, or cargo, and from selling or otherwise disposing of the same, and for a receiver of the ship and cargo; the Lord Chancellor, Lord St. Leonards, held, that the provisions of the Ship Registry Acts applied equally to contracts as to sales, and that the whole frame of these Acts negatived any equity resulting out of

A contract for sale of shares in a British vessel, not reciting the certificate of registry, cannot be enforced.

(1) *Ladbroke v. Lee*, 4 De G. & Sm. 106.

(2) *Hughes v. Morris*, 9 Hare, 636; 2 De G. M. & G. 349.

(3) 8 Hare 1; 2 De G. M. & G. 403.

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An unregistered agreement with registered owner, cannot be enforced against a ship subsequently transferred to a purchaser with notice.

Equities may now be enforced against owners and mortgagees of ships, without prejudice, &c..

the doctrine of notice; and that an unregistered agreement, therefore, with the registered owner of a ship, which the owner subsequently transferred for value to another person who had notice of the agreement, could not be enforced either as against the ship or its proceeds; but *quære, per* the Lord Chancellor, whether upon such a contract an action for damages could be sustained, and how far actual fraud in such a case would be relievable in Equity. But where a bill stated that the vendors of a ship executed a bill of sale to a purchaser, which was to be handed to him upon his paying the consideration in a manner stipulated, but that he took it away with some other paper, as it was supposed, by mistake, and afterwards returned it, saying he could not comply with the terms; and the bill further alleged that the plaintiffs, the vendors, had discovered that the defendant, the purchaser, had taken advantage of his accidental possession of the document to make himself the registered owner of the ship, and was about to sail in her; the Court held, that the alleged fraud would not enable the Court to interfere, and a demurrer to the bill was allowed (1). But now by the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 3, it is declared that the expression "beneficial interest" whenever used in the second part of the principal Act (*i. e.* the Merchant Shipping Act, 1854) includes interests arising under contract and other equitable interests; and that the intention of the said Act is, that—without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition, and of giving receipts, conferred by the said Acts on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships—equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property (2).

21. In *Orr v. Dickenson* (3) it is *quæried* whether under the

(1) *Follett v. Delany*, 2 De G. & Sm. 235.

(2) *v. Lacon v. Liffen*, 4 Giff. 75; 32

L. J. (Ch.) 25, 315; *Stapleton v. Haymen*, 2 H. & C. 918.

(3) *Joh. 1.*

Merchant Shipping Acts, 1854, 1855 (17 & 18 Vict. c. 104, s. 79, and 18 & 19 Vict. c. 91, s. 10), the Court of Chancery has jurisdiction to interfere with a title acquired at Law by the registration of a valid bill of sale of a ship. But in the same case it is held that the 65th section of the 17 & 18 Vict. c. 104, does not deprive the Court of Chancery of its ordinary jurisdiction to protect property during litigation.

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The 65th section of 17 & 18 Vict. c. 104, does not deprive Chancery of jurisdiction to protect property during litigation.

22. By a printed regulation of the London Dock Company, orders for delivery cannot be acted upon unless signed by the party in whose name the goods stand in the company's books, or by a person duly authorized in writing under the hand of the principal to sign them; and where wine had been entered in the books of the company in the name of S., clerk to W., but the bills of lading were in the hands of H., the consignee of the wine, and the wine not having been approved by W., H. agreed to take it back, and applied to W. to return a part of it, but W. refused to do so until his acceptance for the wine should be returned to him; and H. then exhibited the bills of lading to the company, who informed W. that they would deliver the wine to H. (although it was entered in the name of S.), unless they should be restrained by the Court from so doing; and W. and S. thereupon filed a bill against the company and H. for an injunction to restrain the company from delivering the wine to H. without the written order of W. and S., or one of them, and praying that the company and H. might be ordered to pay the costs of the suit; the Court granted the injunction; but as to costs—varying the decision of Vice-Chancellor Sir J. Stuart—held, that as the legal title to the wine was in H. by virtue of the bill of lading, the company were entitled to their costs, which, under the circumstances of the case, were ordered to be paid equally by W., and S., and H.; W., S., and H. also bearing their own costs equally (1).

23. Where a merchant in London had sold on a *del credere* commission for a merchant in Sweden three cargoes of timber not arrived in England, and the Swedish merchant had drawn on the London merchant a bill of exchange for part of the produce, and the Swedish merchant consigned two of the cargoes to H. & Co., of London, directing them to deliver to the London merchant the

(1) *Wright v. London Dock Co.*, 5 Jur. (N. S.) 1411; 4 Jur. (N. S.) 1134.

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bills of lading, on the latter making acknowledgments (which the Swedish merchant was not entitled to require), and on accepting a bill of exchange for the remaining produce of the three cargoes according to an account made out by himself (the Swedish merchant); and the London merchant had given a notice to H. & Co. that he claimed the bills of lading without performing any part of the conditions, and on a subsequent occasion obtained possession of the bills of lading on the understanding that he would perform the conditions; and although he did not give the required acknowledgments, he accepted the bill, which H. & Co. negotiated, and paid over the proceeds to the order of the Swedish merchant; the Lords Justices held—overruling a decision of Vice-Chancellor Sir R. T. Kindersley, in a suit instituted by the London merchant against H. & Co. and the Swedish merchant for an account against the Swedish merchant, and an injunction against H. & Co. to stay an action to recover the bills of lading, and to restrain H. & Co. from parting with the bill of exchange, or if they had done so to declare them liable for the amount; in which suit the Vice-Chancellor had declared that H. & Co., as between themselves and the plaintiff, were entitled to have the proceeds of the bill to repay themselves the advances which they had made in respect of the three bills, and ordered the plaintiff to pay the costs—that H. & Co. were bound by notice of the London merchant's rights, who was entitled to be reimbursed by H. & Co., to the extent of the money received on the bill, the moneys paid by him for or in respect of the three cargoes, so far as these sums were not covered by the proceeds of the two cargoes received (1); but upon appeal the House of Lords reversed the decision of the Lords Justices, and affirmed the judgment of the Vice-Chancellor (2).

24. Where W. and L., owners, had employed B. as master of a ship, and directed him to proceed to the coast of Africa with, as alleged, a full cargo of money and merchandise, and instructions, and B. was, while on that coast, intrusted by A. with money for a certain purpose; but he had expended it in completing his cargo, purchasing necessaries, repairing the ship, and paying wages; and he had forwarded to A. a bill of exchange on W. and L. for the

(1) *Dresser v. Hoare*, 26 L. J. (Ch.)
51; 2 Jur. (N. S.) 1151.

(2) *Hoare v. Dresser*, 7 W. R. 374;
7 H. L. 317.

whole amount, and, as a collateral security, a bill of lading for a specified portion of the cargo, and W. and L. refused their acceptance of the bill of exchange, which was subsequently dishonoured; and they repudiated the whole transaction between B. and A., alleging that B. had been intrusted by them with a sufficient amount of money to meet the entire expenses of the voyage; upon a bill filed by A. against W., and L., and B., praying that the money, with interest thereon from the time it was applied by B., might be paid by W. and L., or in default that it might be declared that A. was entitled to a lien on the specified portion of the cargo comprised in the bill of lading; Vice-Chancellor Sir J. Stuart held, that A. had no legal or equitable right to any part of the cargo *in specie*, but that he was entitled to equitable relief; and as W. and L. had had the benefit of the contract, though not accepted by them, A.'s right to have the proceeds of it must be recognised; and an inquiry was directed as to the extent to which W. and L. had been actually benefited by the use of the money by their agent, in order that they might be charged with the amount (1).

Where ship-owners have had the benefit of a contract by the master, they are chargeable to the extent of the benefit they have derived therefrom.

25. Where upon the purchase of a steam vessel it was agreed among the purchasers that two of them should be the ship's husbands, and should not be removed except on certain grounds specified in the agreement, and the ship's husbands thus appointed obtained a charterparty for her, and they privately stipulated for a weekly payment by way of commission for themselves, in addition to the weekly sum payable by the terms of the charterparty; and in the month of May following the captain, who was a part owner, had a conversation with a clerk of the charterers, in which an observation of the latter led him to suspect that there was some underhand bargain, but the subsequent part of the conversation removed the suspicion; but in October he acquired correct knowledge of what had been done, and, together with the other part owners, except the ship's husbands, gave the ship's husbands notice of dismissal; and the ship's husbands denied the right to dismiss them, and they possessed themselves of some of the machinery of the ship, which was at an engineer's for repairs; and the other part owners thereupon filed a bill, and moved for an

Ship's husbands, part owners, privately stipulating with charterers for a commission to themselves, restrained from retaining possession of the vessel, &c.

(1) *Ashmall v. Wood*, 2 Jur. (N. S.) 827.

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injunction to restrain the ship's husbands from interfering with her sailing by detention of the machinery, and for a receiver of the machinery; the Court held, that the application was not too late; and on it appearing that a decree of possession could not be obtained in the Court of Admiralty, by reason of the plaintiffs being in possession of the hull, or at all events could not be obtained in time to enable the vessel to fulfil her engagement, it also held, that the Court of Chancery had jurisdiction upon motion to appoint a receiver of the machinery, and to direct possession of it to be delivered to him; and an order was made accordingly, the captain being appointed receiver *ad interim* (1).

26. Where an agreement between a merchant and a shipowner for a partnership in a particular voyage of a ship belonging to the latter, was carried into effect by two instruments: one a charterparty, by which about one half of the freight, at a certain sum per ton per month, was made payable by the merchant to the shipowner by monthly instalments during the voyage, and the rest on the return of the ship; the other a memorandum of agreement, which provided that the parties should be liable for the expenses, and interested in the profits of the voyage, in equal moieties; and while the ship was at sea the shipowner deposited the charterparty with his banker, as a security for a balance then due on his account, with an order indorsed thereon addressed to the merchant to pay the freight thereafter to become due to the bankers; and notice of the deposit and indorsement was some time after given to the merchant, who accordingly paid the subsequent instalments as they fell due to the bankers, without informing them of the agreement; but upon the return of the ship, the shipowner having in the meantime become bankrupt, and the voyage having turned out a losing one, the merchant refused to make any further payment, on the ground that, by virtue of the agreement, which was then for the first time brought to the knowledge of the bankers, he was liable for only half the freight made payable by the charterparty; the Court held, however, that although the bankers claimed only as assignees of a chose in action, the merchant having enabled the shipowner, by means of the charterparty, to hold himself out as entitled to the whole freight, and having

Bankers,
depositors of a
charterparty
to secure
balance due by
depositor,
entitled to the

(1) *Brenan v. Preston*, 2 De G. M. & G. 813.

neglected to undeceive the bankers on that point as soon as he found that they had taken a security upon the faith of such apparent title, he was precluded from afterwards asserting any equity inconsistent with that title; and the decree below, restraining an action brought by the bankers for the whole balance of the freight due under the charterparty, was accordingly reversed (1).

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whole freight due under charterparty, as against a merchant entitled to part of freight, who had permitted the depositor (entitled to the other part) to hold himself out as entitled to the whole.

27. If relief, which is the proper subject of the jurisdiction of another Court, be dependent upon relief to be given in this Court, or if the relief which is properly a subject for this Court cannot be given, except that which belongs to another jurisdiction be also given, this Court, to prevent multiplicity of suits, may give both kinds of relief; but if the relief which is sought in a suit be of different kinds, within the jurisdiction of different Courts, and independent of each other, although relating to the same transaction, the right in this Court to one kind of relief will not necessarily draw along with it the right to the other; and therefore, where the bill by a part owner of a ship against the master and the other part owners prayed an account of the past earnings of the ship, to which the plaintiff was entitled, his right to that relief afforded no reason for going on to restrain the sailing of the ship until security, according to the practice of the Admiralty Court, was given for the plaintiff's shares (2). And, *semble*, the Court of Chancery will not, in a case within its jurisdiction, interfere beyond or otherwise than the Court of Admiralty would interfere, at the suit of some part owners, to restrain the sailing of a ship or control her management, there being no question as to the ownership, and the only dispute being as to the powers of the owners *inter se* (3). The Court will not restrain a ship from sailing on the application of the part owner of the smaller ascertained share. The proper application is to the Court of Admiralty to compel the larger part-owner to give security, and this Court interferes only where the shares are unascertained; and the application to restrain is too late when the ship is on the point of sailing with emigrants (4). And in *Christie v. Craig* (5), Lord Chancellor Eldon

Although part owner is entitled to an account of past earnings of ship, the ship will not be restrained sailing until security given, according to practice of Admiralty Court.

This Court will not restrain a ship from sailing at suit of part owner of smaller share. This Court only interferes where shares unascertained.

(1) *Mangles v. Dixon*, 1 Mac. & G.

(3) *Ib.*

437; 1 H. & T. 542.

(4) *Hallaran v. Donal*, 9 Ir. Eq.

(2) *Castelli v. Cook*, 7 Hare, 89.

Rep. 217.

(5) 2 Mer. 137.

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(without any doubt being expressed as to the jurisdiction to restrain a ship from sailing on application of a part owner) refused an injunction to restrain the sailing of a ship, upon the application of a part owner, where the ship was intended to sail the next day, and it did not appear upon the application that there were any circumstances to account for the plaintiff's delay in applying, when he had lain by till after charterparties were made, and exposing the Defendants to the risk of demurrage and other like consequences.

28. Where the plaintiffs (who were part owners of the ship), have founded their title to relief on their rights as charterers, and
- stated that they were managing owners, not for the purpose of relief as managing owners, but in order to protect their right as charterers, they are not entitled to an injunction founded merely on their right as managing owners, but can only be so on the foundation of their right as charterers (1).

A mortgage of a ship at sea is valid.

29. In *Thompson v. Smith* (2) the Court held that a mortgage of a ship at sea (the form of the Registry Act being observed) was valid, and granted an injunction to prevent an improper indorsement on the certificate of registry of the ship (3).

30. In *Lidgett v. Williams* (4) it is *queried* whether the Court will grant an injunction restraining a party from taking a ship to any other than a certain port, thereby in effect compelling him to proceed to such port.

A bill cannot be sustained by several members of a shipping company dissoluble at any moment, to prevent a vessel being sent on a voyage they disapproved.

31. A bill by several members of a shipping company, dissoluble at any moment, to prevent a vessel being sent on a voyage they disapproved, cannot be sustained (5). The Vice-Chancellor, Sir Lancelot Shadwell, said that he was of opinion that the Court ought to interfere between co-partners wherever the act complained of was one that tended to the destruction of the partnership property, notwithstanding a dissolution of the partnership might not be prayed; but that in this case, however, he was not asked to interfere because the ship which was the subject of dispute was in danger of being lost, but because she was about to be sent on a voyage which some of the members of the company disapproved.

(1) *Lidgett v. Williams*, 4 Hare, 464.

(2) 1 Madd. 395.

(3) *Ib.*

(4) 4 Hare, 465.

(5) *Miles v. Thomas*, 9 Sim. 606.

So that, in effect, he was asked to enforce the evanescent authority of a certain number of persons, which authority ceased as soon as any one of the members chose to rebel. That that act was in itself a dissolution; and, *rebus sic stantibus*, he had no sort of jurisdiction to interfere, and allowed a demurrer to the bill (1).

32. Where a timber merchant, in Sweden, agreed to sell certain timber to L. and R., and by the original contract the goods were to be delivered "free on board, payable by buyers' acceptance of seller's draughts, at six months from date of bills of lading, shipment to London," &c.; and the seller was to provide ships at rates not exceeding a certain limit; and it was subsequently agreed that the buyers should themselves charter a ship to convey the timber to London, and the buyers accordingly chartered a ship, and the goods were loaded on board of her; and the bill of lading named the seller as the shipper, and the goods were deliverable in London to "order or assigns," and the seller indorsed the bill of lading in blank, and delivered it to the buyers in exchange for their acceptance, and the buyers deposited the bill of lading to secure an advance; and the ship was obliged to put into Copenhagen, and there, the buyers having stopped payment before the acceptance became payable, the vendor caused a notice of stoppage *in transitu* to be served on the captain; Vice-Chancellor Sir W. P. Wood held, that the *transitus* was not ended by delivery on board the ship, and that the notice was effectual. In this case, the proceeds of the timber having been claimed by the trustees of a creditors' deed executed by the buyers, L. and R., the bill was filed by the timber merchant charging that, by the exercise of his right of stopping the timber *in transitu*, he was entitled in Equity to a valid and subsisting charge for the money due in respect of the price of the timber, together with the interest due in respect thereof, and praying a declaration accordingly, and for an injunction to restrain an action to recover the proceeds of the goods (2).

33. In *Goodhart v. Lowe* (3) Lord Chancellor Eldon refused an injunction to restrain the sailing of a vessel containing goods sold to a person who had become insolvent, but over which the plaintiff

(1) *Miles v. Thomas*, 9 Sim. 606.

(2) *Berndtson v. Strang*, L. R. 4 Eq. 481; 15 W. R. 1168.

(3) 2 Jac. & W. 349.

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The Court will in a proper case exercise jurisdiction by stopping *in transitu*.

retained a right of stoppage *in transitu*; and the Chancellor said that there was no instance that he recollected of stopping *in transitu* by a bill in Equity, and that it would be dangerous for this Court to assume a jurisdiction to stop *in transitu*. But in *Newton v. Hubback* (1), where the plaintiffs had shipped goods to the order of Messrs. D., and received a receipt for them from the mate in charge of the vessel, and before the vessel sailed, and before the bill of lading had been given to the plaintiffs, Messrs. D. became insolvent, having previously indorsed the bill of lading to H. for valuable consideration, without the knowledge of the plaintiffs; the Master of the Rolls, Sir J. Romilly, held, that the plaintiffs had not parted with the control over the goods, and granted an injunction to restrain the ship from sailing with the goods on board.

34. The mortgagee of a ship, by bill of sale, who has omitted to procure an indorsement thereof on the certificate of registry within thirty days after the return of the ship to port, as required by the Registry Act, the registered owner having after that time become bankrupt, has no equity, distinct from his legal rights, to restrain the sale of the ship by the assignees; the title to the ship, after the bankruptcy, depending upon the application of the rule of law with regard to order and disposition (2). But in *Mestaer v. Gillespie* (3) Lord Chancellor Eldon—after stating that the proposition stated in the judgment in *Moss v. Charnock* (4) went to this extent, that if a man sold a ship at sea, the vendee having done everything required by the then Ship Registry Act that could be done, but afterwards, before the arrival of the ship in port, an act of bankruptcy was committed by the vendor, the assignees under the commission of bankruptcy, not the vendee, would take the ship; that the proposition was not so stated in terms, but that the language in which the judgment was expressed covered that case—said, that he, the Lord Chancellor, could not concur in that.

A mortgage of ship on a voyage, with tackle and cargo, present and future, is good against

In *Langton v. Horton* (5) it was held, by Vice-Chancellor Sir J. Wigram, that a deed of assignment by way of mortgage of a ship, together with her tackle and appurtenances, and all oil, head-matter, and other cargo, which might be caught or brought home

(1) 2 W. R. 339.

(2) *Campbell v. Thompson*, 2 Hare, 140.

(3) 11 Ves. 637.

(4) 2 East, 399.

(5) 1 Hare, 549.

in such ship, was, as against the assignor, a valid assignment in Equity, as well of the future cargo to be taken during the particular voyage, as of the cargo (if any) which existed at the time of the assignment. The ship was on her voyage at the time of the assignment; the parties sent notice of the assignment to the master of the ship, and the master delivered up possession of the ship and cargo to the mortgagees immediately after her return from the voyage; the Vice-Chancellor held, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who had afterwards sued out a writ of *fi. fa.*, and proceeded to take the ship and cargo in execution.

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judgment
creditor of
assignor suing
fi. fa. sub-
sequently.

35. Where a vessel has become unable to proceed on her voyage without repairs, the owners of goods shipped on board the vessel may obtain the assistance of the Court to restrain the captain from selling the cargo. But before the Court will grant such assistance the plaintiffs must shew their title to the goods, and must settle with the captain for what is due to him, and must exonerate the captain from his contract to deliver the goods at their place of destination, and from all liability on the bills of lading (1).

36. Where certain consignments of oil were made from Columbo to certain persons resident in England, and during the voyage several of the casks in which the oil was contained leaked, and some part of the oil which so escaped was wholly lost, but the greater part was collected together, and sold in one mass by the captain, in the course of the voyage, for £750, and the consignees then agreed to share the proceeds in proportion to their respective losses; the Court held, first, that a bill in Equity was sustainable by the consignees against the shipowner for an account of the oil lost and the oil sold; and that several actions having been brought by the shipowner against the consignees to recover freight and average, they might all join in one bill against him for an account and equitable set-off (2).

37. Where, under a charterparty entered into by a broker, on behalf of the owner of a vessel, whose name did not appear on After assignment and notice, freight

(1) *Rayne v. Benedict*, 10 L. J. (N. S.) Ch. 297; 5 Jur. 598.

(2) *Jones v. Moore*, 4 Y. & Coll. Ch. 351.

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is no longer in the order and disposition of assignor under the Bankruptcy Acts.

the charterparty, the freight was to be paid to the broker, on behalf of the owner, and the owner assigned the freight to A., who gave notice of the assignment to the broker, but not to the Lords of the Treasury, by whom the freight was to be paid; Lord Chancellor Cottenham—affirming a decision of Vice-Chancellor Sir Lancelot Shadwell, upon a bill praying, amongst other things, that the plaintiff, A., might be declared to be entitled under the assignment to receive the sum due for freight, and for an injunction to restrain the payment of the same to the assignees in bankruptcy of the owner—held, that after such assignment and notice the freight was no longer in the order and disposition of the owner, and consequently did not, on his subsequently becoming bankrupt, pass to his assignees, and that the money due on the charterparty was not in his order and disposition at his bankruptcy (1). Where a trader assigns a debt, the only person to whom notice of the assignment need be given, in order to vest a good equitable title in the assignee, is the party from whom the trader was to have received payment of the money; in other words, the party holding the property at the order and disposition of the trader (2).

The Court has jurisdiction to restrain proceeding in the Admiralty Court on a bottomry bond.

38. The Court of Chancery has jurisdiction to restrain proceedings in the Admiralty Court on a bottomry bond, with the view of administering justice in a more convenient form, and it granted an injunction on that ground in a case where the proceedings in the Admiralty Court were not framed in the most effectual manner to the attainment of their purpose, and where the questions, particularly one of apportionment, were such as could be better tried in Equity (3). And in *Glascott v. Lang* (4), Lord Chancellor Cottenham, affirming a decision of Vice-Chancellor Sir L. Shadwell, held, that the Court possessed and would exercise jurisdiction over a bottomry bond in a case of fraud; and would, for that purpose, restrain proceedings upon the bond in the Admiralty Court, by injunction; and it is not necessary, for the purpose of supporting an interlocutory injunction of that kind, that the Court should find a case which would entitle the plaintiff to relief at all events; it is

(1) *Gardner v. Lachlan*, 4 My. & Cr. 129, affirming S. C. 8 Sim. 123; see S. C. 6 Sim. 407.

(2) *Ib.*

(3) *Duncan v. McCalmont*, 3 Beav. 409, affirmed on appeal, 3 Aug. 1841.

(4) 8 Sim. 358; 3 My. & Cr. 451.

sufficient if the Court finds, upon the evidence then before it, a case which makes the transaction a proper subject of investigation in a Court of Equity. And after long acquiescence under such an order the Court will not readily entertain an application for dissolving it (1).

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39. A bottomry bond executed by the master of a ship cannot be supported against the owners, if the master, at the time of executing the bond, had other resources for obtaining the necessary supplies for the ship (2). This was a suit by the first mortgagee of a ship seeking to set aside or postpone a bottomry bond subsequently granted by the master and part owner of the ship.

A bottomry bond cannot be supported, if the master had other resources.

40. Where upon a bill by an underwriter of a policy of marine insurance (the ship insured having been lost) to restrain an action brought by the insured for the amount of the policy, and to have the policy itself delivered up to be cancelled, on the ground of deviation and delay in the voyage, and the unseaworthiness of the ship; and on the trial a verdict was given for the plaintiff, defendant at Law, on the ground that he proved the deviation, but he failed in proving unseaworthiness, and he then brought the suit to a hearing without evidence as to the unseaworthiness, insisting that the policy ought to be delivered up; the Court held, that the whole case turning upon a mere question of fact, and there being no fraud, as there would have been had there been a representation of seaworthiness upon insuring, there was no equity, and the bill was dismissed, with costs (3).

41. Where the plaintiffs advanced several sums of money to S., M., and W., on the security of shipments coming to them as return remittances from their correspondents in Hayti, which shipments they directed the Haytian house to consign to the plaintiffs, and the Haytian house was informed of the contracts, and promised the plaintiffs to make the remittances accordingly; and in June, 1842, a cargo of goods was prepared by the Haytian house as return remittances, and they directed the plaintiffs to insure a part of the cargo on the account of S., and informed W. that a part of the cargo was intended for him, which W. communicated to the plain-

(1) *Glascott v. Lang*, 8 Sim. 358; 3 My. & Cr. 453, n.

3 My. & Cr. 451.

(3) *Thornton v. Knight*, 16 Sim.

(2) *Dobson v. Lyall*, 2 Ph. 323, n.; 509.

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Where rights, if any, are equitable, the plaintiff is entitled to the aid of this Court and to restrain proceedings in the Lord Mayor's Court.

tiffs; and the resident partner in the Haytian house died in June, 1842, after the cargo had been shipped, but before it was consigned, and his administratrix consigned the cargo to B. in London, under whose orders it was sold, and by whom the proceeds were received in December, 1842; and S. & Co., creditors of the Haytian house, on the 29th of August, 1842, attached by foreign attachment, according to the custom of London, the goods of the Haytian house in B.'s hands; and by a letter dated the 7th of September, 1842, the surviving partner in the Haytian house directed B. to hold the cargo for H., M., & W. in certain parts; on a bill and motion to restrain the proceedings of S. & Co. against B. in the Lord Mayor's Court, the Court held that the right of the plaintiffs, if any, was an equitable and not a legal right; that the plaintiffs were entitled to the aid of the Court in the trial of the right, and that the proceedings in the Lord Mayor's Court should be restrained by injunction (1).

42. Where a ship belonging to the defendants, registered in the port of London, sustained serious damage on her voyage to New Zealand, and on the arrival there was surveyed and pronounced not seaworthy, and the master was unable, either by loan or bottomry, to raise money for her repair, and he at length sold the ship to the plaintiffs, and on receiving payment of the purchase-money by bill of exchange on London, executed to them a bill of sale of the ship; and the plaintiff repaired the ship and sent her to England with a cargo, and the defendants refused to ratify the sale or consent to the registry of the ship in the plaintiffs' names; and on the arrival of the ship in the port of London the defendants put several men on board to take possession of the ship and cargo for them, and the plaintiffs thereupon applied for an injunction to restrain the defendants from interfering with the ship, or removing her out of the jurisdiction, and for a manager and receiver of the ship and cargo; the Court held, that the plaintiffs had no equitable, as distinct from a legal, title to the ship; and inasmuch as their title (if they had acquired any) was a purely legal one, and the case of interference, if wrongful, was therefore a mere trespass, the Court could not interfere in favour of the plaintiffs by injunction. But that the plaintiffs, according to the case made on the motion, if

Though plaintiffs (here) had no equitable title to ship, yet entitled (here) to relief in respect of a bill of ex-

(1) *Cotesworth v. Stephens*, 4 Hare, 185.

they failed at the hearing to establish their right to the ship, would be entitled to equitable relief in respect of the bill of exchange given for the purchase-money, and that they were entitled to have the trial of the legal right put in a course for determination, and to have the property protected in the meantime; and, *semble*, in such case, independently of the relief in respect of the bill of exchange, if engagements had been contracted of which the conduct of the defendants would prevent the fulfilment, and if there could be no adequate compensation to the plaintiffs in damages, or if the defendants were about to carry away or destroy the property, the Court might interfere by injunction (1).

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change given
by master for
sale of ship.

43. The lien which exists for general contribution upon the goods of each freighter to individual loss by property thrown overboard for the safety of the ship, under the right of the master to require security from each for his proportion of the loss, was, in *Hallett v. Bousfield* (2), held not to be extended to an injunction against the master and shipowner restraining them from delivering the cargo, receiving the freight, and parting with any share of the ship. But the mode of adjustment is not confined by usage to arbitration.

The lien for
general con-
tribution to
individual
loss by pro-
perty thrown
overboard for
safety, does
not extend to
restrain
delivery of
cargo, receiv-
ing freight,
and parting
with share of ship.

44. The assignee of a particular freight who gives to the charterers notice of his security, is entitled in priority to the general assignee of all freight to be earned by the same ship, who is prior in date, but gives no notice, and takes no steps to enforce his mortgage until after the particular assignee has given notice to the charterers, and the cargo has been in part discharged. And where A. took an assignment of a ship by way of mortgage, which was duly registered at the custom-house in 1862, and which referred to an assignment of all freights and earnings of even date given as an additional security, but not registered, and, subsequently, B. took an assignment by way of the freight of a particular voyage, and A. and B. were both ignorant of each other's claims, but B. gave notice of his claim to the charterers before the termination of the voyage, while A. did not give notice of his claim till after the ship had broken bulk; Vice-Chancellor Sir J. Stuart—upon a bill praying that it might be declared that the plaintiff B. was entitled to a charge on the freight, payable under the charterparty, in priority

Assignee of
particular
freight, giving
notice, is
entitled to
priority to
general prior
assignee of
all freight
not giving
notice.

(1) *Ridgway v. Roberts*, 4 Hare, 106.

(2) 18 Ves. 187.

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to the claims of the defendant A., and that the charge might be enforced, and the freight secured for the plaintiff's benefit under the decree of the Court, and that the other defendants, the charterers, might be restrained from paying the freight to any other person than the plaintiff, and for a receiver, and (by amendment) that if the Court should be of opinion that A.'s securities had priority over the plaintiff's, that the plaintiff might be at liberty to redeem A.—held that B.'s claim on the particular freight must prevail over the general claim of A. (1). But Lords Justices Wood and Selwyn, upon appeal, held (reversing the decree of Vice-Chancellor Stuart) that A., as mortgagee of the ship, having taken possession of her before any freight had become payable from the charterers to the owners, was entitled to the freight in priority to B.

45. Where A. having ordered goods from B., a firm at Calcutta, through C., their agent in this country, received an invoice of the goods, with a notice that B. had drawn upon him for the price at six months, and on calling at C.'s office, A. was met by C.'s messenger, who handed to him for his acceptance the bill of exchange drawn upon him in respect of the goods, and the bill of lading which was pinned to the bill of exchange; and A. accepted the bill of exchange, and afterwards deposited the bill of lading with E. as a security for an advance, together with a policy of insurance upon the goods effected by himself in his own name; and C. having declined to part with the original policy, on the ground that it included other goods besides those purchased by A.; and A. having become bankrupt, and unable to take up his acceptance, the goods were claimed by B. and C., on the ground that the bill of lading had been improperly pledged, having come into A.'s hands irregularly, and without their knowledge, and contrary to an alleged custom amongst East India merchants not to part with the bill of lading of goods until the vendee has taken up his acceptances on account thereof; Vice-Chancellor Sir W. P. Wood held, that the alleged custom of trade was merely exceptional (2), and was not established by the evidence as being the usual course of business;

(1) *Brown v. Tunner*, L. R. 2 Eq. 806; 12 Jur. (N. S.) 791; 14 W. R. 911; L. R. 3 Ch. 597. (2) *v. Gurney v. Behrend*, 3 E. & B. 622, 630; *per* Crompton, J.

and that the title of E. as *bonâ fide* assignees for value must prevail over any claim by the unpaid vendors, the bill of lading having passed to the plaintiffs, E., their title was sufficient, and the Vice-Chancellor said they were entitled to the relief prayed (1). In this case the plaintiffs filed their bill praying to restrain the delivery of linseed ~~ex~~ Ganges otherwise than to the plaintiffs or their order, and to restrain any interference to prevent the plaintiffs from obtaining possession of the linseed, for the appointment of a receiver, a sale of the linseed, and application of the proceeds in satisfaction of plaintiffs' claim, and relief in damages and costs (2).

46. Where the owner of a ship mortgaged her to G. for £1200, and the mortgage was on the same day transferred to B., and the mortgage and transfer were registered; and in October, 1863, G. paid B. £1200, and B. signed a receipt indorsed on the mortgage that the £1200 was received "in discharge of the within-written security," and the usual entry of discharge was made in the registry; and after a year B. retransferred to G. this mortgage, and the registrar wrote in the margin of the register that the receipt had been made by mistake, a retransfer only being intended; and G. then transferred the mortgage to the appellants by way of security, which transfer was registered; and in March, 1865, the moneys advanced were paid off, but no retransfer executed, and the mortgage remained in the appellants' hands; and in May, 1865, the owner of the ship mortgaged her to G. by a deed registered on the following day, and this mortgage was transferred to the plaintiff in November, 1865; but the transfer was not registered till July, 1866; and in the meantime, in March, 1866, an agreement which never was registered was entered into between G. and the appellants that G.'s original mortgage should be a security for the balance due from G. to the appellants; the Court of Appeal held, affirming the decision of the Master of the Rolls—upon a bill seeking for a declaration that the plaintiff was entitled to the first charge on the ship, for an account of what was due on his security, for the sale of the ship and for the payment to him of the proceeds of the sale, and of the freight moneys, and for an injunction restraining the appellants from selling the ship—that the plaintiff's security had priority over that of the appellants; that G.'s first mortgage was

(1) *Coventry v. Ghulstone*, L. R. 4 Eq. 493; 16 W. R. 304.

(2) *Ib.*

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Guardian of
registered
infant owner
of ship has no
power to sell
or mortgage
ship on behalf
of infant.

discharged by the entry of discharge, and could not be revived by the memorandum; that the receipt had been given by mistake; and that the new bargain between G. and the appellants in March, 1866, not being registered, was of no effect against the plaintiff (1).

47. The guardian of a registered infant owner of a ship has no power under the Merchant Shipping Act, sect. 99, to sell or mortgage the ship on behalf of the infant; and upon a bill by the next friend of an infant owner of a ship against the parties assuming to be mortgagees and their sub-mortgagees, praying an account, and that the mortgagees should not be allowed to charge for their disbursements in respect of the ship (for which the mortgage had been made) any greater sum than a sum equivalent to the difference between the value of the ship at the time she was taken possession of by the defendants and the amount for which the ship was insured (the ship having been lost); and that the other defendants, sub-mortgagees, might be restrained from paying to the original mortgagees any money which should come to their hands in respect of insurance upon the ship; Vice-Chancellor Sir R. Malins held, that the security upon the ship was invalid, and that the defendants were not entitled to any other lien upon the ship, or the proceeds of the ship, or the policy moneys which had been substituted for the ship, than the outlay which had been advanced by the original mortgagees for necessary repairs, and gave no costs on either side (2).

SECT. 16. *Specific Performance.*

1. Where a gentleman, who had a valuable collection of historical books, paintings, &c., had applied to auctioneers to undertake the sale of the same, and to advance him money on account of the proceeds, and an agreement had been come to in writing between the parties, by which, in consideration of the advance, the owner of the collection agreed to deposit the whole of the collection with the auctioneers for sale, and a portion had been deposited with and

(1) *Bell v. Blyth*, L. R. 4 Ch. 136; (2) *Michael v. Fripp*, L. R. 7 Eq. L. R. 6 Eq. 201; 38 L. J. (Ch.) 178; 95; 38 L. J. (Ch.) 29; 19 L. T. (N. S.) 16 W. R. 885; 17 W. R. 194; 19 L. 257; 17 W. R. 23. T. (N. S.) 662.

sold by them, but realised much less than was anticipated, and did not amount to more than one half of their advance; and upon his refusal to deposit the remainder of the collection a bill was filed by the auctioneers against the owner, praying specific performance of the agreement, and for an injunction to restrain the selling or removing of the remainder of the collection, to which a demurrer was filed for want of equity; the Master of the Rolls, Sir J. Romilly, held, that the Court would not compel the performance of a contract for an agency, and that the advance of the money was not on the security of the property mentioned in the contract, and that the Court would allow the defendant a *locus poenitentiae*; and that, subject to the satisfaction of the auctioneers' claim for what they had done (which was a matter to be decided in a Court of Law) the defendant had not, by the agreement, lost the control over that portion of his property which he had retained (1).

2. Where the plaintiffs employed the proprietors of a dock to alter a ship, and an agreement provided for the alterations and for payment upon certificates of an engineer, the added parts to be the property of the the owners, without prejudice to any lien for unpaid instalments; and if the proprietors refused to complete, the company to be entitled to the parts added to the ship, and to articles in the yard intended for the alterations, the owners to pay the proprietors an amount ascertained by arbitrators to be the value of the articles, and in case of refusal and failure to complete, the owners to enter the yard, and employ workmen to finish the vessel; and before the alterations were completed the proprietors became bankrupt, and B. the trustee of the bankruptcy, had offered the dock for sale; upon a bill against B. praying a declaration that the plaintiffs were entitled to use the dock and complete the vessel, and to restrain the defendants from selling the dock, &c., Lord Romilly, allowed a demurrer; he said he thought it impossible to give any relief, the agreement being one which from its nature could not be specifically enforced, the general principles being that the Court could not enforce specific performance of a contract by piecemeal (2).

(1) *Chinnock v. Sainsbury*, 6 Jur. (N. S.) 1818; 30 L. J. (Ch.) 409.

(2) *Merchant Trading Company v. Banner*, 19 W. R. 707; L. R. 12 Eq. 18.

CHAPTER III.

INCIDENTS OF PROPERTY (REAL AND PERSONAL).

PART I.

SECT. 1. *Light—Light and Air.*

1. In cases of obstruction of ancient lights, where the Court is called upon to exercise its power of mandatory injunction, ordering the defendant to restore things to the condition in which they were before the old building was removed, each case must be decided upon its own peculiar circumstances (1). And the jurisdiction of the Court to interfere by way of mandatory injunction should be exercised with the greatest possible caution; and, *semble*, should be confined to cases where the injury cannot be estimated and sufficiently compensated by a pecuniary payment. Therefore in a suit instituted to restrain the defendants from proceeding with the erection of a building which it was alleged obstructed ancient lights, Lord Chancellor Westbury (reversing a decision of the Master of the Rolls, Lord Romilly) refused to grant a mandatory injunction, on the ground that the whole of the prejudice and damages to the plaintiff's premises by the erection of the defendant's buildings might be abundantly compensated in money. And the defendant having admitted that some damage had been done to the plaintiff by obstructing his light and air, but alleging that the amount of injury was exaggerated, the Court directed that instead of an injunction an inquiry should take place before itself to ascertain the amount of pecuniary damage (2).

No injunction to restrain obstruction of light where plaintiff has not accepted title.

2. An injunction will not be granted to restrain the construction of works obstructing lights, &c., where the title to the property sought to be protected has not yet been accepted by the plain-

(1) *Isenbury v. East India House* Jur. (N. S.) 221; 33 L. J. (Ch.) 392; *Estate Co.*, 3 De G. J. & F. 263; 10 9 L. T. (N. S.) 625; 12 W. R. 450.

(2) *Ib.*

tiff (1). Vice-Chancellor Sir J. Stuart, in this case, said that the plaintiff in his bill stated that he had not accepted the title, and that by this he said in effect, that he did not pledge himself to accept a conveyance of the property, that this was fatal to the motion, and that if the injunction were granted, the plaintiff might next week reject the title altogether, and that this would not be consistent with the dignity of the Court, and the motion was refused with costs.

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3. The foundation of the jurisdiction in Equity to interfere by injunction is the existence of an injury to property of such a nature as to render the property in a material degree unsuitable for the purposes to which it is applied, or to lessen considerably the enjoyment of that property. Such an injury is considered by the Court to be incapable of compensation in damages (2). But, *semble*, where the abridgment of light complained of does not materially interfere with the comfort of the persons complaining, and does not materially diminish the suitability of the premises for the present purposes to which they are applied, the Court has no jurisdiction to interfere by injunction on the ground of a diminution of light which, having regard to a future possible destination of the property, may materially diminish its value (3). And it is not in every case in which an action can be maintained for the obstruction of ancient lights that an injunction will be granted by a Court of Equity, but the standard of the amount of damages that calls for the exercise of the jurisdiction has not been defined with any certainty; and in order to justify the interference of the Court by injunction the obstruction of the ancient lights of a manufactory, or of business premises, must be such as to render the building to a material extent less suitable for the business carried on in them; but such obstruction must be one which diminishes the value of the premises for the purposes for which they are used at the time; and the fact that the obstruction may render the premises less fit for some other purposes to which they may by possibility be applied at a future time cannot be taken into consideration; therefore where the owners of premises used as the counting-house

The foundation of the jurisdiction by injunction is the existence of injury rendering property unsuitable to its objects, or lessening enjoyment of property.

An injunction is not granted in every case where an action can be maintained for obstruction of ancient lights.

Obstruction which may render premises less fit for other purposes to which they may be

(1) *Heath v. Maydew*, 13 W. R. 199. 688; 10 L. T. (N. S.) 635; 33 L. J.

(2) *Jackson v. Newcastle (Duke)*, 3 (Ch.) 698.

De G. J. & S. 275; 10 Jur. (N. S.) (3) 1b.

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applied at a future time, cannot be considered.

A Court of Equity interferes to prevent injury in respect of a legal right, simply on ground of damage.

of a grocer's shop, applied for an injunction to restrain the erection of a building which would obscure an ancient light; and the Court, being of opinion upon the evidence that the intended erection would not materially interfere with the enjoyment of the premises as a counting-house, so as to require its interference by injunction; held, that the possible future injury, by rendering the premises less fit for a business requiring more light, was not a ground for such interference (1). But in *Wilson v. Townend* (2) it is laid down by Vice-Chancellor Sir R. T. Kindersley that a Court of Equity interferes by injunction to prevent an injury in respect of a legal right, simply on the ground of the damage it produces to property, and that the jurisdiction of the Court is not confined to restraining injury to the enjoyment and comfort in the occupation, and that therefore it is not necessary that a party filing a bill for an injunction to restrain such an injury should be in the actual occupation of the property, nor is it necessary that he should continue to occupy it.

4. A Judge sitting in Equity is bound to pronounce his judgment according to the evidence; hence, to decide a case upon conclusions of fact derived from ocular inspection is a course which a judge in Equity cannot, in ordinary cases, be recommended to adopt (1).

Any alteration of ancient lights gives owner of servient tenement right to obstruct them. But if alteration is made with knowledge and apparent acquiescence of owner of servient tenement, Court will restrain his interference.

5. Any alteration of ancient lights, although not prejudicial to the owner of the servient tenement, gives him a right to obstruct them (3); but where the owner of a dominant tenement in the course of rebuilding materially altered his ancient lights, and opened new lights upon an additional floor after communication with the owner of the servient tenement, and with the knowledge and under the inspection of the surveyor of the owner of the servient tenement, but without any express agreement; the Court held, that in Equity the lights, as altered, could not be interfered with, and granted a perpetual injunction; and that the owner of the servient tenement could not raise a party wall and build upon his own property so high as to render the new buildings less

(1) *Jackson v. Newcastle (Duke of)*, 1109.
10 Jur. (N. S.) 688; 10 L. T. (N. S.)

(3) *Cotching v. Bassett*, 32 Beav. 635; 33 L. J. (Ch.) 698. 101; 9 Jur. (N. S.) 590.

(2) 1 Dr. & Sm. 324; 6 Jur. (N. S.)

accessible to light and air than they were at the completion of the works (1).

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6. Where lessees covenanted with the lessor that they would within four years "rebuild, on the site of a messuage, in a substantial workmanlike manner, a new house and premises suitable for merchants' and dealers' counting-houses and sale rooms," and that "such of the windows and lights in the new premises as occupied the site of ancient lights should be considered and have all the rights of ancient lights," and also covenanted that the right of carriage way through a court, into which there was a back entrance from the premises, should be preserved; and the old house had been pulled down, and the lessees were erecting a main back wall of the new premises partly upon land not the subject of the demise, and were preparing to block up the carriage way at a distance of eight feet easterly from the entrance of the house into the court; the Lord Chancellor held, reversing a decision of Vice-Chancellor Sir W. P. Wood, that the word "rebuild" did not create the obligation of erecting the new house on the same site, nor in the same style and elevation as the old building, and that if otherwise, such construction was rebutted by the language that followed the word "rebuild;" and that the covenant respecting ancient lights was limited to such rights, and to such estate and interest as the lessees possessed in the adjoining land, and could affect only such lights and windows in the new house as might look towards buildings to be thereafter erected on land belonging to the lessees; but that it might be equally well applied to a new back wall which was erected not precisely on the site of the old back wall, as to one erected wholly on the same site (2).

7. Where an offer is made which will have the effect of putting a plaintiff in as favourable position as before the erection of the building or obstruction complained of, the Court ought not to interfere to compel the pulling down of such building or to restrain its completion (3).

Where an offer would put plaintiff in a position as favourable as original one, Court ought not interfere.

8. Where a plaintiff filed a bill to restrain an obstruction to lights alleged to be ancient, and the defendant denied that they

(1) *Cotching v. Bassett*, 32 Beav. 101; 9 Jur. (N. S.) 590. (2) *Low v. Innes*, 10 Jur. (N. S.) 1037; 11 L. T. (N. S.) 217.

(3) *Ib.*

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There is no right of obstructing ancient lights, even though new lights added cannot be obstructed without obstructing the ancient ones.

The right to an ancient light since the Prescription Act depends on that statute, and not on presumption of grant or licence.

To restrain interference with light and air, the residence must be

were ancient lights, and on a jury trial some were found to be ancient, and the rest to be new or altered in position within twenty years; on the plaintiff submitting to an order to block up the new and restore the altered windows to their old position, the Court granted an injunction, but the plaintiff was ordered to pay the costs of the suit, other than those of the issues (1). And in *Cherrington v. Abney* (2) it was held that where an old house is pulled down in which were ancient lights, and a new one is built, the lights in the new house must be in the same place and of the same dimensions, and not more in number than the lights in the old house. But in *Tapling v. Jones* (3), where A. was the owner and occupier of a house of three storeys which had an ancient window on each floor, and he altered the windows in the two lower floors, leaving the window in the third floor unaltered, and also built two new storeys to his house, with windows intended to be permanent, but did not intend by making these alterations to abandon any privileges of his ancient windows, and B., the owner of adjoining premises, could not obstruct the new windows in the upper floor without also obstructing the old windows, and he, B., built on his own land a wall which had the effect of obstructing all A.'s windows; and A. afterwards blocked up his new windows, and sued B. for continuing the obstruction of the wall, which the defendant refused to remove; the House of Lords held, that B. had not at any time the right to build a wall which would have the effect of obstructing the ancient lights in A.'s house, although the new windows could not otherwise have been obstructed, and that the right to an ancient light since the Prescription Act (2 & 3 Will. 4, c. 71) depends upon the statute, and does not rest on any presumption of a grant or a fiction of a license having been obtained from the adjoining proprietor, overruling *Renshaw v. Bean* (4) and *Hutchinson v. Copestake* (5).

9. A plaintiff coming to the Court for an injunction to restrain the erection of new buildings by his neighbour on the ground of interference with his light and air, must shew that his own residence will, by the obstruction, be rendered substantially less

(1) *Weatherley v. Ross*, 1 H. & M. 349.

(2) 2 Vern. 646.

(3) 11 H. L. C. 290; 34 L. J. (C. P.) 342.

(4) 18 Q. B. Rep. 112.

(5) 9 C. B. Rep. (N. S.) 863.

comfortable for purposes of occupation. But though an injunction be refused in such a case, the Court, if it appear that damages have been sustained, may, if it think fit, exercise the jurisdiction conferred by 21 & 22 Vict. c. 27, and direct an inquiry as to damages (1). But the Lords Justices held, differing from Vice-Chancellor Sir W. P. Wood on the point of acquiescence, that there had been no such acquiescence as would have deprived the plaintiff of his right to relief at the hearing of the cause, and that a delay of five weeks after knowledge of an intention to build so as to obstruct ancient lights was not, under the circumstances, such acquiescence as to disentitle the plaintiff to relief; and, *semble*, a stronger case of acquiescence is requisite to debar a plaintiff from relief at the hearing of a cause than to disentitle him to an interlocutory injunction; but the Lords Justices refused an injunction here, on the ground that the plaintiff had not shewn that his residence would be rendered substantially less comfortable for the purposes of occupation by interference with his light and air. In this case the plaintiff and defendant occupied adjoining houses, and the defendant intending to erect a glass room as a photographic studio on a portion of his premises, called on the plaintiff and informed him of his intention, pointing out the situation, but this was done after dark on a spring evening. He also said he had a plan of the erections, and a contract for their performance. The plaintiff made no objection, being, as he alleged, under the impression that the new buildings were to be in a different situation, but never made further inquiries, nor asked to see the plan; the defendant commenced his preparations eleven days afterwards, and about a week later commenced the actual building. About a week after this the plaintiff discovered his mistake as to the position of the new buildings, and four days later wrote to the defendant to desist, and threatened proceedings in the Court of Chancery if compliance were refused; and filed his bill eight days afterwards, and when the buildings were nearly complete.

10. Where an owner of a house, in which there were ancient lights, rebuilt it, and in so doing altered the position of some

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rendered
substantially
less comfort-
able for
occupation.

(1) *Johnson v. Wyatt*, 2 De G. J. *Northern Railw. Co.* 10 Jur. (N. S.) & S. 18; 33 L. J. (Ch.) 394; 9 Jur. 191. (N. S.) 1333; see *Swaine v. Great*

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On closing up new and restoring ancient lights to original position, an injunction will be granted to owner of dominant tenement.

of the ancient windows, and also opened new windows, and the defendant proposed to build so as to obstruct both the new and ancient windows; Vice-Chancellor Sir W. P. Wood held, that as he could not possibly obstruct the new windows without at the same time obstructing the ancient lights, the owner was not entitled to an injunction (1); but that, on undertaking to close up the windows and to restore the ancient lights to their original position, he would be entitled to an injunction (2). And if the owner of a tenement has windows looking upon the premises of another, he cannot increase their size or number, or claim more extensive rights (3). But where a landlord who had granted a lease of premises, including ancient lights and appurtenances, to A., in consideration of improvements which had been made by A. in the premises leased (which improvement included new lights, which would be referred to under the word "appurtenances"), granted a lease of the adjoining premises to B., and B. was building so as to block up the lights of A.; Vice-Chancellor Sir R. T. Kindersley held, that the landlord could not have blocked up such lights, and that his lessee, B., could stand in no better position; and granted an injunction as against B. during the continuance of A.'s lease, and although he had not made an interlocutory application (4).

Translucent screen of glass with louvres (here) not such an obstruction of light and air as entitled to injunction.

11. In a case where an occupier of a house and grounds, in London, erected a translucent screen of glass thirty-five feet high, and about thirty feet distant from the windows of the plaintiff's dwelling, having louvres or slanting openings to admit air, Vice-Chancellor Sir J. Stuart refused an injunction, not considering this such an obstruction of light and air as the Court would interfere with by injunction (5).

Sect. 3 of the Prescription Act is retrospective, and the easement of light and air may be acquired by twenty years' enjoyment prior to Act.

12. Sect. 3 of the 2 & 3 Will. 4, c. 71, limiting twenty years as the period for acquiring an indefeasible right to the access and use of light, is retrospective, so that such an easement may be acquired by virtue of enjoyment prior to the passing of the Act (6); and

(1) *Weatherley v. Ross*, 32 L. J. (Ch.) 128.

(2) *Ib.*

(3) *Cooper v. Hubbuck*, 30 Beav. 160; 7 Jur. (N. S.) 457.

(4) *Davies v. Marshall*, 1 Dr & Sm. 557; 7 Jur. (N. S.) 720.

(5) *Radcliffe v. Duke of Portland*, 3 Giff. 702; 8 Jur. (N. S.) 1007.

(6) *Simper v. Foley*, 2 J. & H. 555.

a union of the ownership of dominant and servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives; and where a right to an easement of this description is acquired against an owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion (1).

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Union of ownership of dominant and servient tenements for different estates, merely suspends the

easement of ancient lights; upon severance—easement revives. Such an easement acquired against lessee is acquired against reversioner.

13. Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from the date of that promise, before proceedings were taken; the Court held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy (2).

14. A tenant from year to year may file a bill for an injunction to protect an easement consisting of the right to the access and use of light, but the injunction will be limited to the period of continuance of his tenancy (1).

Tenant from year to year is entitled to an injunction to protect easement of ancient light, limited to the period of his tenancy.

15. A tenant under an agreement for a lease is not entitled to an injunction to restrain his lessor from obstructing the ancient lights on the premises comprised in the agreement, unless he also ask to have the agreement specifically performed, and a motion by the tenant for an injunction was refused (3).

Tenant under agreement for lease cannot restrain obstruction to ancient lights by lessor unless he also ask specific performance of the agreement.

16. Where the Court considered that it ought to refuse an injunction to restrain the obstruction of ancient lights on the ground of delay, it retained the bill, with liberty to proceed at Law (4).

17. The owner of an ancient light being a lessee whose lease has expired during the obstruction, but who has agreed for a renewal, can still maintain his suit for an injunction to protect his right to the access of light (5).

Lessee under lease expiring during obstruction of ancient light, who has agreed for a renewal, is entitled to an injunction.

18. Where a plaintiff filed a bill for an injunction to restrain the erection of an addition to the house adjoining one of his own, so as to interfere with his windows, which he alleged were ancient lights,

(1) *Simper v. Foley*, 2 J. & H. 555.

(4) *Cooper v. Hubbuck*, 30 Beav

(2) *Gale v. Abbot*, 8 Jur. (N. S.) 987, v. pl. 31, *post*.

160; 31 L. J. (Ch.) 123.

(5) *Gale v. Abbot*, 8 Jur. (N. S.)

(3) *Fox v. Purcell*, 3 Sm. & G. 242. 987.

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The owner of the dominant tenement cannot depart from mode of user substantially.

But owner of ancient lights may increase light and air if he does not enlarge apertures.

some of which had been recently enlarged, and some new lights had been opened, and an interim order had been granted; upon a motion for an injunction the Court gave him liberty to bring an action, but allowed the defendant to proceed with the new building to a specified height, on his undertaking to abide by any order the Court might make as to pulling down any addition which might be made to the erection complained of by the bill, and also undertaking to admit at the trial that the erection had been carried to such specified height (1); and the Vice-Chancellor, Sir R. T. Kindersley said, under the circumstances disclosed by *Benshaw v. Bean* (2), he should not take upon himself to decide the legal question, whether when the ancient windows have been enlarged or altered the right of easement is lost (3). In *Turner v. Spooner* (4) the same Vice-Chancellor in substance lays down the doctrine that the principle as to ancient lights is, that the owner of the dominant tenement cannot depart from the mode of user substantially, that he cannot change the position of his lights, nor increase the original aperture into which windows have been put, but that if he has in using his right contracted to any given extent the original opening by windows of antique and clumsy structure, he may, without affecting his right, replace those windows by windows of an improved structure that let in more light and air. But if a party possesses ancient lights, and, without enlarging the apertures, can acquire an increased degree of light and air, he is entitled to such acquirement without giving a right to the occupier of the servient tenement to say there is a new easement; but if he increases the dimensions of the apertures, the occupier of the servient tenement has a right to object; and if, in asserting his right, he interferes with the passage of light and air, he is justified in doing so (5); therefore where a plaintiff possessed of ancient lights substituted new window frames, with single plate-glass panes opening internally, for the old ones, consisting of small panes with lead frames, opening only partially, and in consequence of this alteration more light and air were let in, although the

(1) *Wilson v. Townend*, 1 Dr. & Sm. 324; 6 Jur. (N. S.) 1109.

(2) 18 Q. B. 112.

(3) *See vide* pl. 8, *ante*.

(4) 1 Dr. & Sm. 467; 30 L. J. (Ch.) 801.

(5) *Ide* pl. 8, *ante*.

apertures were not increased ; and the defendants, whose premises were adjoining, objected to this alteration, on the ground that it was a new easement and interfered with the privacy of their premises, and they proceeded to erect a framework, glazed with opaque coloured glass, within a few inches of the plaintiff's ancient lights ; the Court, at the hearing, granted an injunction to restrain the defendants from allowing the framework to remain, so as to darken, injure, or obstruct the plaintiff's ancient lights, the interlocutory injunction merely extending to restrain the continuation of the glazing, and not to the removal of the framework ; the Court being always very reluctant upon interlocutory applications to grant a mandatory injunction (1).

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The Court is always very reluctant upon interlocutory applications to grant a mandatory injunction.

19. The Court will interfere to restrain apprehended injury where it is clear the act intended to be committed would injure or destroy a clear legal right ; and a lessee of a dwelling-house in which he carried on business as a diamond merchant was held entitled to an injunction restraining the owners of premises adjacent (who afterwards purchased the reversion of the lessee's house) from constructing the party-wall which they were about to rebuild so as to occasion such an obstruction of the lessee's ancient lights, however slight, as would injure him in his business (2).

The Court restrains apprehended injury where the act would injure or destroy a clear legal right—an obstruction of ancient lights, injurious to business of diamond merchant, restrained.

20. The intrusion upon a neighbour's privacy, even by opening a new window to overlook his neighbour's premises, and so interfering, perhaps, with his comfort, is not a ground for interference either at Law or in Equity (3).

Intrusion upon neighbour's privacy by new window, not a ground of interference.

21. A plaintiff who has himself in an insignificant degree obscured the light and air to his own dwelling-house is not thereby disentitled to an injunction to restrain the defendant from erecting a building so as seriously to diminish the supply of light and air (4). And where a bill stated that the erection of a proposed building would materially affect the comfort and enjoyment, in respect of light and air, of the inhabitants of an adjoining house, of which there had been uninterrupted enjoyment for twenty years

Plaintiff himself obstructing light and air in an insignificant degree, not disentitled to injunction to restrain seriously diminishing light and air.

(1) *Turner v. Spooner*, 1 Dr. & Sm. 467 ; 30 L. J. (Ch.) 801 ; *Jones v. Tipling*, 12 C. B. (N. S.) 842, per Blackburn, J.

(2) *Herz v. Union Bank of London*, 2 Giff. 686 ; 1 Jur. (N. S.) 127.

(4) *Arcedeckne v. Kelk*, 2 Giff. 683 ; 5 Jur. (N. S.) 114.

(3) *Turner v. Spooner*, 1 Dr. & Sm.

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Obscuring
ancient lights
restrained, on
ground of
express con-
tract as exist-
ing between
landlord and
tenant.

and upwards, the Court granted an injunction to restrain the erection of such building, the plaintiff undertaking to bring an action within one month (1).

22. The right to an ancient light depends upon an implied contract (2); but there may be a right to a light depending upon an express contract, and therefore the defendants, who had become the reversioners of the premises, and who were about to diminish their lessee's ancient light, were, upon the principle of ancient light and implied contract, and also express contract, as existing between landlord and tenant, restrained by injunction from obscuring the ancient light (3).

23. Where the plaintiff was in the enjoyment of ancient lights, and there had been a building adjoining his with a wall alleged to have been twelve feet high, and not interfering with his light; and the defendant was about to pull down the ruins of this wall, and rebuild it thirty feet high, which he alleged was the original height, but the plaintiff's evidence as to the original height was more precise than the defendant's; and the defendant said he never intended to build beyond the original height, but the plaintiff proved that he threatened to build much beyond twelve feet, and an interlocutory injunction had been obtained, which the defendant never moved to dissolve; at the hearing of the cause a decree for a perpetual injunction was granted, without requiring the plaintiff to try his right at Law (4).

24. Where a building was in the course of erection at a distance of thirty feet from the windows of a mansion, and an injunction was applied for to restrain the defendant from proceeding with the erection, the Court held, that this was no case for an immediate injunction, but the plaintiff was put upon terms to try the legal right, the defendant undertaking to abate if a verdict should go against him (5).

25. In *Sutton v. Montfort* (6) Vice-Chancellor Sir L. Shadwell granted an injunction to prevent the obstruction of ancient lights against a lessee of an ecclesiastical corporation, subject

(1) *Arcedeckne v. Kelk*, 2 Giff. 683; 1 Jur. (N. S.) 127; 2 Giff. 686.
5 Jur. (N. S.) 114. (4) *Potts v. Levy*, 2 Drew. 272.
(2) *Sed vide* pl. 8, *ante*. (5) *Smith v. Elger*, 3 Jur. 790.
(3) *Herz v. Union Bank of London*, (6) 4 Sim. 559.

to the plaintiffs establishing their rights to the easement in an action.

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26. In *Ryder v. Bentham* (1) an injunction was granted by Lord Chancellor Hardwicke against building or erecting whereby any of the plaintiff's lights might be obstructed, but he directed the scaffolding or poles and boards already raised to be pulled down until the trial of the right, which was directed on a motion to pull down what had been done; the Lord Chancellor observing that he never knew an order to pull down anything on motion, that it was sometimes, though rarely, done on a decree, but that the Court would indeed sometimes order the going on to be stopped.

27. In *Back v. Stacy* (2) Lord Chancellor Eldon (under the then practice) granted an injunction *ex parte* until the defendant should fully answer the bill, or other order to the contrary, to restrain the owner of a house from making any erections or improvements so as to darken or obstruct the ancient lights or windows of an adjoining house.

28. In *Wyntanley v. Lee* (3) the Master of the Rolls, Sir T. Plumer, refused an injunction to restrain the obstruction of ancient lights in a case where the nature of the alleged injury did not require the preventive interposition before a trial at Law, and the legal right was doubtful.

29. The Court will not grant an injunction against darkening ancient windows in every case affecting the value of premises that would support an action; the effect must be, that material injury, amounting to nuisance, which should not only be redressed by damages, but upon equitable principles prevented (4).
The Court will not grant injunction against darkening ancient windows affecting value of premises that would support action—there must also be material injury amounting to nuisance to be redressed on equitable principles.

30. The Court will not grant an injunction to stay building in a case of mere injury or inconvenience to property or persons adjoining or otherwise, except by agreement, or where the building is of such a nature as to stop up ancient lights (5); and in *Fishmongers' Company v. East India Company* (6), Lord Chancellor No injunction to stay building causing mere injury or inconvenience, except where an agreement, or ancient lights stopped.

(1) 1 Ves. Sen. 543; *sed vide*, as to mandatory injunctions on motion, *Beadel v. Perry*, L. R. 3 Eq. 465; pl. 46, *post*.

(2) 2 Russ. 121.

(3) 2 Sw. 333.

(4) *Att.-Gen. v. Nichol*, 16 Ves. 838.

(5) *Morris v. Lessees of Lord Berkeley*, 2 Ves. Sen. 453.

(6) Dick. 164.

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Rendering a prospect less pleasant is no reason for preventing a man building on his own ground.

The twenty years' enjoyment under ss. 3 & 4 of the Prescription Act, are to be reckoned from the commencement of enjoyment to time of bringing action. Interruption of enjoyment not interruption within the Act unless acquiesced in for a whole year.

Hardwicke refused an injunction to restrain building in the City of London, seventeen feet off the plaintiff's house, being of opinion that it was not a nuisance contrary to law, for that it was not sufficient to say it would alter the plaintiff's lights, for then no vacant piece of ground could be built on in the City, and here there would be seventeen feet distance, and the law said that it must be so near as to create a nuisance; and that it was true the value of the plaintiff's house might be reduced by rendering the prospect less pleasant, but that that was no reason to hinder a man from building on his own ground.

31. Under the 2 & 3 Wm. 4, c. 71, ss. 3, 4, a party is prescriptively entitled to the access and use of light, if his enjoyment thereof commenced twenty years next before the bringing of an action in which the right is contested, provided such enjoyment has not at any time been interrupted, and the interruption acquiesced in, for a whole year. Accordingly, where A. had the free access of light and air through a window of his house for nineteen years and 330 days, and B. then raised a wall which obstructed the light, and the obstruction was submitted to only for thirty-five days, when A. brought an action to remove it; the House of Lords held, that the right of action was complete, that the twenty years' enjoyment was to be reckoned from the commencement of the enjoyment to the time of bringing the action, and that an interruption of the enjoyment, in whatever period of the twenty years it may happen, cannot be deemed an interruption within the meaning of the Act unless it is acquiesced in for a whole year (1).

32. In *Wynstanley v. Lee* (2) the Master of the Rolls, Sir T. Plumer, held, that the presumption of a right, from twenty years' undisturbed enjoyment of light, was excluded by the custom of the City of London; but this custom was abolished by virtue of the Prescription Act, 2 & 3 Wm. 4, c. 71 (3), the 3rd section of which extends to the custom of London, which authorized one neighbour to obstruct the access of light to another's messuage, &c., by building on an ancient foundation; and in an action for building so as to darken windows which had been enjoyed for twenty years

(1) *Flight v. Thomas*, 8 Cl. & F. • (2) 2 Sw. 333.

231; S. C. West, 671; 5 Jur. 811; v.

(3) *Yates v. Jack*, L. R. 1 Ch. 295, pl. 13, ante. 296, 299.

without interruption, the custom of London is now no longer a defence (1).

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33. If a landowner sells any portion of his land, the purchaser has a right to build upon it so as to obstruct the ancient lights on the remaining portion of the land (2); and so, where the owner of a house sells a piece of adjoining land, the purchaser may build on it as he pleases, and the vendor cannot prevent his doing so, even although the buildings erected on it may interfere with his ancient lights (3).

Purchaser of land from landowner of adjoining lands, can obstruct ancient lights thereon.

34. Where a house is erected on the site of an old house which has been burned down, the windows of which were ancient lights, the question whether the character of ancient lights attaches to the new windows depends on the question whether the servitude they would impose on the servient tenement is substantially the same as that which previously existed; and where the windows of a new house so erected, although somewhat differing in form from the windows of the old house, were of about the same area and very nearly in the same positions, Vice-Chancellor Sir R. T. Kindersley held, that the servitude imposed on the servient tenement not being a more onerous nor a different servitude, the character of ancient lights attached to the new windows (4).

The question whether the character of ancient lights attaches to new windows of house built on site of another one burnt down, which had ancient lights, depends on the question whether the servitude they would impose is substantially the same as previously existed. No injunction to restrain obstruction of ancient lights merely because house rendered less cheerful; there must be material annoyance.

35. The Court will not grant an injunction to restrain an obstruction of ancient lights merely because the effect of such obstruction is to render the plaintiff's house less cheerful; but if the effect is to cause material annoyance to the inmates of the house in the ordinary occupations of life, and to deprive them of such an amount of light as they might reasonably calculate on enjoying, then the Court will interfere (5); and Lord Chancellor Cranworth in this case ruled, that the locality of the plaintiff's house, whether in a large town or in the country, was to be taken into consideration in estimating the amount of obstruction necessary to justify the interference of the Court; and that, in estimating the damage to the plaintiff, the Court would consider whether the

(1) *Truscott v. Merchant Taylors' Company*, 11 Ex. 855; *Cooper v. Hubbuck*, 12 C. B. (N. S.) 466.

(2) *Curriers' Company v. Corbett*, 11 J. R. (N. S.) 719; 13 W. R. 538.

(3) *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355.

(4) *Ib.*

(5) *Clarke v. Clark*, L. R. 1 Ch. 16; 11 Jur. N. S. 914; 35 L. J. Ch. 151.

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There is no essential difference in amount of light and air that may be claimed in town and country—Court will restrain obstruction, though area small, if it cause inconvenience.

It is not every interference that will be restrained—there must be material inconvenience.

An owner of ancient lights is entitled, not merely to sufficient for his then business, but to all the light he has enjoyed before the interruption.

place in which the obstruction was complained of was in the country, or in a populous city, and whether the effect of the inconvenience was felt opposite or obliquely to the light obstructed; but that, in a large city, the mere obstruction of the direct rays of the sun for two hours in the day during the winter months was not a sufficient ground for granting an injunction, and reversed a decision of Vice-Chancellor Sir W. P. Wood, who had granted an injunction (1). But in *Martin v. Headon* (2) it was held, by Vice-Chancellor Sir R. T. Kindersley, that there is no essential difference in the amount of light and air that may be claimed in town and country, and that the Court will interfere, though the amount of sky area abstracted is small, if its proportion to the previous amount of sky is such that the abstraction causes inconvenience.

36. It is not every interference with the access of light which will entitle a plaintiff to the interposition of a Court of Equity, he must shew material injury in order to obtain the assistance of the Court (3).

37. In a case where an injunction had been granted to restrain a defendant from erecting buildings so as to darken ancient lights, but with liberty to apply at Chambers with respect to any proposed erection of buildings on his property which might cause an interruption of the ancient lights; Vice-Chancellor Sir W. P. Wood having ruled that the foundation of the jurisdiction in Equity to interfere was the existence of an injury to property of such a nature as to render the property in a material degree unsuitable to the purposes to which it was applied, or to lessen considerably the enjoyment of the property; Lord Chancellor Cranworth, on appeal, held, that an owner of ancient lights is entitled, not only to sufficient light for the purpose of his then business, but to all the light which he has enjoyed previously to the interruption sought to be restrained; and that where an injunction is granted against obstructing the ancient lights of business premises, the Court ought not to make any declaration narrowing, or appearing

(1) *Clarke v. Clark*, L. R. 1 Ch. 16; 11 Jur. (N. S.) 914; 35 L. J. (Ch.) 151.

(2) L. R. 2 Eq. 425; *et v. Lyon v. Dillimore*, 14 W. R. 511.

(3) *Curriers' Company v. Corbett*, 11 Jur. (N. S.) 1719.

to narrow, the right of the plaintiff to the quantity of light theretofore used by him for the purpose of his business (1).

38. In *Lawrence v. Austin* and *Durell v. Pritchard* (2), the Master of the Rolls, Lord Romilly, held, that a plaintiff coming to the Court to prevent an obstruction of ancient lights must take proceedings before the obstruction complained of is completed, otherwise his remedy is by action, and that it was immaterial whether he knew of the obstruction before it was completed, and that a Court of Equity would not, in the absence of fraud, interfere to prevent the obstruction of light and air, or any other easement, if the obstruction had been actually completed before filing the bill; and that in such a case the Court could have no cognizance whatever of the matter, and would grant neither a mandatory injunction nor damages, but would leave the plaintiff to his remedy at Law. However, in *Durell v. Pritchard* (3), on appeal, Lords Justices Turner and Knight Bruce held, that there is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before filing the bill, and that there is no difference in this respect between injury to easements and to other rights; and that the mere fact that the damage created by obstruction of light is completed before the bill is filed is not of itself a sufficient ground for refusing a mandatory injunction; and that in this, as in any other case of injury to easements, the Court looks to the particular circumstances of each case, but that it will interfere by way of mandatory injunction only in cases where extreme or very serious damage will ensue from non-interference (4). But where a small portion of a building which had obstructed a plaintiff's light and air was completed after the filing of the bill, the Master of the Rolls, Lord Romilly, ordered such portion to be pulled down, and directed an inquiry as to damages in respect of the injury caused by the other part of the building (5).

There is no rule which prevents Court granting a mandatory injunction where injury completed before bill filed, and this applies to injury to easements.

39. Where a bill was filed for an injunction to restrain the

(1) *Yates v. Jack*, L. R. 1 Ch. 295; 12 Jur. (N. S.) 305. *Thompson*, pl. 50, *post*.

(2) 11 Jur. (N. S.) 576; 34 L. J. (Ch.) 598. (4) *Ib*. (5) *Lawrence v. Austin*, *Durell v. Pritchard*, 11 Jur. (N. S.) 576; 34 L. J. (Ch.) 598; 13 W. R. 981.

(3) L. R. 1 Ch. 244; *v. Calcraft v.*

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defendants from interfering with the plaintiff's right to light and air, and an interlocutory motion was made accordingly, but before the motion was made the interference was carried to a certain point beyond which the defendants undertook it should not be extended; the Court held, that although it might, at the hearing of the cause, grant a mandatory injunction, the better course was merely to continue till then the defendants' undertaking, and to make the costs of the motion costs in the cause (1).

Court will protect a plaintiff whose personal comfort and enjoyment, and trade or business, is prejudicially affected by diminution of light.

40. Where buildings complained of were finished before the bill was filed, and the plaintiffs were not occupiers, but owners in reversion of the servient tenement, the Court ordered an inquiry as to damages occasioned by the new buildings (2). The Court will interfere to protect a plaintiff whose personal comfort and enjoyment, and, *a fortiori*, one whose trade or business is prejudicially affected by the diminution of light, and if the obstruction has been completed since the filing of the bill, will assess damages by way of compensation (3).

The fact that amount of compensation can be ascertained, does not prevent Court from acting on the ground of irreparable mischief.

41. Where there is, substantially, interference with comfort, and diminution of light for carrying on business, so that substantial damages would be given at Law, the Court will restrain injury to ancient lights; and the fact that the amount of compensation is capable of being ascertained by a jury does not prevent the Court from acting on the ground of irreparable mischief. In such a case there is no difference between the rights of a plaintiff in respect of a house in a town or in the country; but to establish a sufficient defence to a case of alleged injury of this description, the defendant must shew that, for whatever purpose the plaintiff may wish to employ the light whilst the house retains its original character, there will be no material interference with it; and the following grounds of defence—first, that the plaintiff will have, when his injury is complete, as much light and air as other persons have for the same purposes; secondly, that the plaintiff might avoid the injury by enlarging his windows; thirdly, that the plaintiff has been accustomed to use blinds to his windows; fourthly and fifthly,

(1) *Dunball v. Walters*, 12 L. T. (N. S.) 759.

(2) *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355.

(3) *Martin v. Headon*, L. R. 2 Eq. 425; 12 Jur. (N. S.) 387; *vide* pl. 38,

ante.

that a room used for a special purpose is not well adapted to that purpose, and that it has been so used without the knowledge of the defendant; and sixthly, that the defendant intends to cure the evil by building with glazed tiles, or other means for improving the light—are insufficient (1).

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42. The Court will not grant an injunction to restrain the erection of a building on account of its obstructing the plaintiff's light, unless the plaintiff can shew that he will sustain substantial damage; if he cannot do this, his ground of application to the Court fails, and the Lords Justices Turner and Knight Bruce held—reversing a decision of Vice-Chancellor Sir R. T. Kindersley—that no inquiry will be granted as to damages, and dismissed the bill altogether, but without prejudice to an action at Law; and, on the ground of the weight of the opinion of the Vice-Chancellor, also without costs, and allowed no costs of appeal (2).

No injunction against erecting a building on account of obstructing light, unless substantial damage will be sustained—and in such a case there will be no inquiry as to damages.

43. Where W., residing near Fenchurch Street, London, had ancient windows looking into an archway, and a passage passing under part of his house towards the rear, and also a skylight near a cottage belonging to Messrs. H., who pulled down the cottage, and commenced a building intended to be very lofty, immediately facing the end of the archway passage, and on a written notice from W. they desisted; but seven months after, when the Courts were not sitting, suddenly recommenced, and carried up the wall to a great height, before a bill could be filed, or an interim order for an injunction obtained, which was done as soon as possible, to restrain raising any buildings so as to obstruct the plaintiff's light and air, and the enjoyment of his ancient lights, and for damages; Vice-Chancellor Sir R. T. Kindersley said, that this was a case in which it appeared to him, supposing there was sufficient injury, the Court would give damages, and held, on the evidence at the hearing, and measurement of sky area, that the plaintiff was entitled to be compensated by damages, the defendants to pay the costs (3).

44. A lessee of a dwelling-house, in which he has for nearly eight years carried on business as a repairer of jewelry and

(1) *Dent v. Auction Mart Company*,
Pilgrim v. Auction Mart Company,
Mercers Company v. Auction Mart
Company, L. R. 2 Eq. 238; 12 Jur.
(N. S.) 447; 14 W. R. 709.

(2) *Robson v. Whittingham*, L. R. 1
Ch. 442; 12 Jur. (N. S.) 40.

(3) *Webb v. Hunt*, 14 W. R. 725;
12 Jur. (N. S.) 558; v. pl. 38, ante.

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watches, is entitled to damages against the owner of adjacent premises, who is in the process of constructing a building which would occasion such an obstruction of his ancient light as to injure him in his business; and the Vice-Chancellor, Sir J. Stuart, said the plaintiff was entitled to an injunction, although not to one of a mandatory kind (1).

No injunction against obstruction of the sight of a shop-window, unless access of light and air obstructed, nor because it injures plaintiff by obstructing view of place of business.

45. If there is no interference with the access of light and air, the fact that a shop-window is obstructed in such a way that it cannot be seen from so great a distance as formerly affords no ground for the interference of a Court of Equity (2); and the erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business (3).

Additional walls must be built back from the original one, in a proportionate distance to the height they are to be erected.

46. The Courts of Common Law, in deciding cases of light and air within the metropolitan district, require persons erecting additional walls to their premises to carry them back from the original wall in a proportionate distance to the height they are about to be erected; and Vice-Chancellor Sir J. Stuart, following this rule, restrained a party by a mandatory injunction from building a wall more than ten feet higher than his original wall, this being the distance between the two walls; and the Court will not, in an ordinary case, restrain the erection of a building the height of which above an ancient light is not greater than the distance from the light; and where, pending the litigation, the defendant continued the building complained of, a mandatory injunction was granted on motion. The Court (Vice-Chancellor Sir J. Stuart) said, that it had been clearly proved in this case, that opposite to the plaintiff's ancient lights the defendant had built a wall very much higher than the distance between them and the wall, and that, to that extent, the defendant must, in his opinion, take his wall down, and granted a mandatory injunction to that effect on an interlocutory application, saying that he had never heard of any supposed rule of the Court, that mandatory injunctions could not properly be made except at the hearing of the cause (4), and that Lord Cotten-

(1) *Lyon v. Dillimore*, 14 L. T. L. R. 2 Ch. 158.

(N. S.) 183; 14 W. R. 511; v. pl. 38, ante.

(2) *Smith v. Owen*, 14 W. R. 422.

(3) *Butt v. Imperial Gas Company*,

(4) *Vide Ryder v. Bentham*, 1 Ves. Sen. 543, pl. 26, ante, as to this point, and also the same case as to the observation with reference to Lord Cottenham.

ham was, so far as he knew, the first judge who proceeded by way of mandatory injunction. On an appeal from this decision the Lords Justices ordered the motion (and also a motion to commit for breach) to stand to the hearing, the costs of the appeal to be dealt with by the Vice-Chancellor (1).

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47. The Court, though it will grant a perpetual injunction to restrain the darkening of ancient lights, will yet in a proper case retain the power of sanctioning any proper scheme which may be proposed by the defendant, and will, for this purpose, give liberty to apply to the judge in Chambers with reference to any such scheme, and will not require the payment of costs as a condition precedent to such application (2). But in this case the Court refused an application by the defendants, before the hearing, for the appointment of a person to survey and report upon the property, under 15 & 16 Vict. c. 80, s. 42, evidence having been given only on the part of the plaintiff (3).

The Court, in a proper case, will retain power of sanctioning scheme, though it grant a perpetual injunction against darkening of lights.

48. Where, in an injunction suit to restrain a defendant from obstructing the plaintiff's light and air, a motion for a decree was made nearly three years after filing the original bill, and other proceedings in the suit, and after various acts on the part of both plaintiff and defendant whereby it appeared to the Court that each party had, to some considerable extent, injured the other; the Master of the Rolls held, that although the plaintiff sought the injunction and damages against the defendant, and the defendant was to some extent to blame, still that, upon the evidence, the proper course was simply to dismiss the bill without costs (4). Where sufficient damage to the access of light to the plaintiff's premises was shewn to support a mandatory injunction, such an injunction was not granted, but only damages given, through the combined effect of the following circumstances: first, that the plaintiff had shewn delay in complaining; secondly, that the plaintiff had at one time offered to accept a certain sum as compensation; and, thirdly, that very great damage would be caused

Delay in moving for decree, and mutual acts of injury, held to disentitle (here) to relief.

Delay from April to November, offer to accept compensation, and great damage to

(1) *Beadel v. Perry*, L. R. 3 Eq. 12 L. T. (N. S.) 681.
405; 15 W. R. 120. (3) *Ib.*

(2) *Stokes v. City Offices Company*, (4) *Cocks v. Romaine*, 14 L. T. 2 H. & M. 650; 12 Jur. (N. S.) 558; (N. S.) 390.
11 Jur. (N. S.) 560; affirmed on appeal,

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defendant by a mandatory injunction, held to disentitle (here) to injunction, and only damages given.

To entitle to access of an extraordinary amount of light for a particular purpose, there must be open, uninterrupted, and known enjoyment for twenty years.

There can be no suit for damages for invasion of ancient lights, if injunction is refused.

to the defendant by an injunction (1); and although in this case the circumstances justified the Court in granting a mandatory injunction at the hearing, to compel a defendant to pull down newly-erected buildings to the height of the former ones, on the ground of obstruction to the plaintiff's light and air; yet the plaintiff, having heard of the intended structure in April, and not having complained till the November following, during which time the defendants had laid out large sums; and the plaintiff having also, since the bill had been filed, made an offer to take a money compensation for the injury to her rights; Vice-Chancellor Sir W. P. Wood, instead of an injunction, directed an inquiry as to the amount of damages sustained by the plaintiff (2).

49. In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open, uninterrupted, and known enjoyment of such light, in the manner in which it is at present (*i. e.*, at the time of filing the bill) enjoyed and claimed, must be shewn for a period of twenty years; and in this case, the evidence only shewing the enjoyment of the user for a period within twenty years, the bill was dismissed with costs (3).

50. In *Calcraft v. Thompson* (4) the Master of the Rolls, Lord Romilly, held that a suit could not be sustained in the Court of Chancery, for the purpose of recovering damages for an invasion of ancient lights, when the injunction is refused. This was a suit to restrain the invasion of ancient lights by mandatory injunction, the alleged obstruction having been completed before the bill was filed; and the Master of the Rolls said that the evidence in the case did not shew that the damage amounted to the "very serious damage which would arise from the interference of this Court being withheld," mentioned by Lord Justice Turner in his judgment in *Durell v. Pritchard* (5), as justifying the interference by way of mandatory injunction, and dismissed the bill with costs. This decision was affirmed on appeal by Lord Chancellor Chelmsford, so far as it decided that there was

(1) *Senior v. Pawson*, L. R. 3 Eq. 330; 15 W. R. 220.

(2) *lb.*

(3) *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421.

(4) 35 Beav. 559; 15 W. R. 387.

(5) 35 L. J. (Ch.) 223; *v. pl.* 38, *ante*.

not sufficient damage or diminution of light to entitle the plaintiff to the special interposition of the Court by way of mandatory injunction; and the Lord Chancellor, in his observations on the *quantum* of injury to ancient lights necessary before the Court will interfere by granting relief generally, and with reference to a mandatory injunction, observed, that this *quantum* of injury was not to be estimated by a limitation with reference to any particular use to which the premises were put at the date of the obstruction complained of.

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51. Where a purchaser takes with notice of adjoining windows, he is thereby put upon his inquiry as to whether they are privileged or not; and if privileged, it is immaterial whether as modern windows by grant, or as ancient by prescription; and where the owners of two adjoining plots of ground leased one to the plaintiffs for building purposes, the lease containing an agreement that the windows should be constructed in certain positions and manner; and the plaintiffs, with their lessors' sanction, erected a building with certain windows (involving a variation from the description in their lease) deriving light and air from the other plot; and subsequently the defendants purchased the adjoining plot, under a conveyance with a marginal plan, which was held to give them notice that the plaintiffs' building contained windows receiving light from the plot purchased by the defendants; Lord Chancellor Chelmsford held, affirming a decision of Vice-Chancellor Sir W. P. Wood, that the "agreement" in the lease amounted to an express covenant between the plaintiffs and their lessors, and that the variation in the size, number, and position of the windows did not amount to a breach of the covenant; but that, had there been a breach, the subsequent acts of the lessors amounting to a waiver, and the lessors being thereby estopped from interfering prejudicially with the windows, the defendants claiming under them could be in no better position; and that misrepresentation or concealment practised against the defendants by their vendors could not have affected the right of the plaintiffs to light as against the defendants. The Lord Chancellor said the windows were there before the defendants' eyes, and *prima facie* presented an obstacle to any building being placed so as to obstruct them, and that they challenged inquiry whether they were privileged or

Purchaser with notice of adjoining windows, is put upon inquiry whether privileged.

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An obstruction of light and air by buildings rendering house uncomfortable, and entitling to substantial damages, will be restrained.

Lights enjoyed twenty years before the Prescription Act are ancient lights, and the 4th section of the Act does not apply to them.

Though owner contribute to diminution of light, yet entitled to restrain obstruction.

Owner of dominant tenement is entitled to restrain obstruction of light and air, though he has acquired more light from alterations of others.

not, and if privileged, it was immaterial whether by grant or prescription (1).

52. Where proposed buildings would obstruct the light and air, so as to render plaintiff's house uncomfortable to such a degree as would entitle him to recover substantial damages at Law, the Court will grant an injunction to restrain the building of the houses (2). But the Vice-Chancellor (Sir J. Bacon) said that his judgment was in no degree influenced by the consideration of any inconvenience from the loss of a prospect (3).

53. Lights uninterruptedly enjoyed for twenty years anterior to the passing of the Prescription Act (2 & 3 Will. 4, c. 71), are ancient lights; and in a case where lights had become ancient lights before the statute, the 4th section of the Act—which enacts, “that the period of twenty years (mentioned in the 3rd section as that necessary to give an absolute right to the access of light), must be the period next before the commencement of the suit relating to such lights”—was held, by Vice-Chancellor Sir J. Stuart, not to apply (4).

54. When ancient lights are obstructed, the fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light, will not in itself preclude him from obtaining an injunction against the person causing the obstruction; and where the defendant built a wall to the north of the windows of the plaintiff's house, by which his ancient lights were interfered with, and the plaintiff was at the same time enlarging his own premises whereby he diminished the light coming to his own windows by shutting off some of the light from the south and south-west, Lord Justice Sir G. M. Giffard held, reversing a decision of Vice-Chancellor Sir J. Stuart, that the plaintiff was entitled to an injunction (5).

55. The easement of the owner of the dominant tenement to have his light and air unobstructed by newly-erected buildings is not lost or diminished by the circumstance that, by means of

(1) *Miles v. Tobin*, 16 W. R. 465;
17 L. T. (N. S.) 432.

(2) *Kelk v. Pearson*, 23 L. T. (N. S.)
458; 19 W. R. 269.

(3) *Ib.*

(4) *Ladyman v. Grave*, 19 W. R.
344.

(5) *Staight v. Burn*, L. R. 5 Ch. 63;
39 L. J. (Ch.) 289; 18 W. R. 243; 22
L. T. (N. S.) 831.

clearances effected in the neighbourhood by other parties than the owner of the servient tenement shortly before the alterations, the owner of the dominant tenement acquired more light than the buildings could subtract (1).

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56. Where the owner of two contiguous houses in the City of London sold one to the defendant, by a conveyance which correctly marked out the ground site of the house conveyed, and one of the first-floor rooms in the house retained by the owner projected over the site, and was supported by the other house; Vice-Chancellor Sir W. M. James held, upon a bill by the owner to restrain the defendants building over or on the roof of the projecting room, that the vertical column of air over so much of the room as overhanging the defendant's site belonged not to the owner, but to the defendants, and dismissed the bill with costs, but without prejudice as to the ownership of the room (2).

57. The lessee of a house and garden, forming part of a large area of building-ground, will not be entitled, under the usual covenant for quiet enjoyment, in the absence of special contract, to restrain the lessor, or persons claiming under him, from building on the adjoining land so as to obstruct the free access of light and air to the garden (3).

58. There can be no prescription for light and air over open ground (4).

59. Although, in *Heath v. Bucknall* (5), it is laid down that when an owner of a building having ancient lights replaces them by new larger windows, a Court of Equity will not interfere by injunction to restrain the owner of the servient tenement from obstructing them, and that the case of *Tapling v. Jones* (6) applies only to the right of the owner to recover damages at Law, and is not, in such a case, to be extended to establish his right to relief in Equity; yet, in *Staight v. Burn* (7), Lord Justice Sir G. M. Giffard said

Though owner of ancient lights replaces them by larger windows, yet still entitled to equitable relief.

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|---|--|
| (1) <i>Dyers' Company v. King</i> , L. R. 18 L. T. (N. S.) 629; <i>Roberts v. Macord</i> , 9 Eq. 438; 39 L. J. (Ch.) 339; 18 W. R. 1 M. & Rob. 230. | (4) <i>Ib.</i> |
| 404; 22 L. T. (N. S.) 120. | (5) L. R. 8 Eq. 1; 38 L. J. (Ch.) 372; 17 W. R. 755; 20 L. T. (N. S.) 549. |
| (2) <i>Corbett v. Hill</i> , L. R. 9 Eq. 671; 22 L. T. (N. S.) 263; 39 L. J. (Ch.) 547. | (6) 11 H. L. C. 290. |
| (3) <i>Potts v. Smith</i> , 38 L. J. (Ch.) 58; L. R. 6 Eq. 311; 16 W. R. 891; | (7) L. R. 5 Ch. 163; 39 L. J. (Ch.) 289; 18 W. R. 243; 22 L. T. (N. S.) 831. |

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that, with respect to the case of *Heath v. Bucknall* (1), he could not take it as having been decided otherwise than upon its particular circumstances—those particular circumstances, as he gathered them, being, that a very small and almost inappreciable proportion of the ancient window was preserved, and the rest was new; so that there would have been no material damages at Law; but that, if this case was supposed to lay down the proposition that a plaintiff who, according to *Tapling v. Jones* (2), has clear legal rights, cannot come to this Court and get protection for those rights, he entirely demurred to such a conclusion.

No mandatory injunction unless substantial, material, or serious infringement.

60. A Court of Equity will not interfere by mandatory injunction to preserve a right to light and air, unless there has been a substantial, material, or serious infringement of such right (3).

61. The terms of an injunction which had been granted restraining a party from erecting and building, so as to darken, hinder, or obstruct the free access to light and air, as such access was previously enjoyed, though absolute and unqualified, are not used in an absolute and unqualified sense (4).

If inconvenience is small, there will be neither mandatory injunction nor damages.

62. Where A. and B., two houses, were separated from each other by a gullet two feet wide, and in house A. there was a window a foot square, five feet above the ground, on one side of the gullet, the window being the only window of the pantry of house A., and the owner of house B., in the lifetime of a tenant for life of A., and with her approval, pulled down house B., and built a new house in such a manner as to encroach upon the gullet, and to exclude the light and air from the pantry of house A., and after the death of the tenant for life of A., the reversioners filed a bill against the owner of house B. for a mandatory injunction, or, alternatively, for damages for the obstruction of light and air; Vice-Chancellor Sir W. M. James held, under the circumstances, that the inconvenience was not sufficiently serious to entitle the plaintiffs to relief, either by mandatory injunction or by an inquiry to assess damages (5).

The right to light and air is as much

63. An Act of Parliament alone can give any person the right of taking the property of another without his consent, on payment of

(1) *Supra*.

(4) *Ib*.

(2) 11 H. L. C. 290.

(5) *Sparling v. Clarkson*, 17 W. R.

(3) *Beadel v. Perry*, 17 W. R. 185; 518.

19 L. T. (N. S.) 760.

an adequate pecuniary compensation, and the right to property as the land which enjoys this easement on the land of another (1).

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64. The title to light acquired under the Prescription Act (2 & 3 Will. 4, c. 71), by a twenty years' enjoyment, is a right to a certain amount of light only, and does not prevent the owner of one of the adjacent tenements from altering the aperture through which that amount of light approaches (2).

The title to light under the Prescription Act is a right to a certain amount of light only.

65. Where the owner of two leasehold messuages, held on a term for ninety-nine years, demised one for the residue of the term, less one day, to L, he himself occupying the other, in which he carried on the trade of a jeweller, and L., on entering, paid a premium of £300, and a rent of £7 10s. was reserved, and subsequently R. became, by the completion of twenty years' uninterrupted enjoyment, entitled to the use of windows in the rear of his house looking into a yard, upon which the house demised by him also looked, as ancient lights; and in the demise there was a covenant restraining each party from building on the space between the backs of the houses so as to obstruct the light and air between certain points marked in an annexed plan, and L. pulled down his house and commenced building nearer and higher than the former erections; the Court held that there was a violation of the covenant, a material injury in the obstruction of light and air, and a clear right to the ancient lights, and granted a perpetual injunction, with costs (3).

66. When, on the site of old buildings, the erection of new buildings of much greater height, materially obstructing the access of light and of air to adjoining property, has been completed before complaints made or bill filed, the Court, although it has jurisdiction to grant a mandatory injunction, will not do so where the owner of such property has himself treated the case as one for compensation by damages. But the Court, having that jurisdiction, will direct an inquiry to assess damages, and will not leave the plaintiff to his remedy by action (4); and, although a month should elapse between

A month's delay after

(1) *Dunball v. Walters*, 35 Beav. 565. 641.

(2) *Maguire v. Grattan*, 16 W. R. 1189; Ir. R. 2 Eq. 246.

(3) *Rolason v. Levy*, 17 L. T. (N. S.)

(4) *Gort (Viscountess) v. Clark*, 18 L. T. (N. S.) 343; 16 W. R. 569; v.

pl. 2, p. 101, ante.

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completion
of building
not laches
(here).

the completion of the building and any objection thereto, the Court will not consider that there was laches or acquiescence on the part of the owner of the adjoining property when he was not himself in possession or occupation of it (1).

67. Where the windows of the back return of M.'s house looked into a passage or yard nine feet wide, and the opposite wall of G.'s house was thirty feet high, and G. proposed to take down the existing wall of his house, and rebuild it at a height of sixty feet, but with a recess of eight feet opposite one-half the frontage of M.'s wall, and the rooms, the light of which was interfered with, were small and low, and the evidence as to the amount of light of which the windows would be deprived, and the extent to which M.'s premises would be diminished in value, was conflicting, the Court, being of opinion that the windows would be deprived of a considerable amount of sky area, granted a prohibitory injunction, and declined to give an issue (2).

No perpetual
injunction
until disputed
title settled
at Law.

68. It is held that there cannot be a perpetual injunction in regard to lights, in a case of disputed title, until the question has been settled at Law (3).

69. A., the owner of a house, purchased from B. a strip of land adjoining his lot for the purpose of keeping it open and free from buildings. B. erected a house on the line of this strip, and opened windows overlooking it, whereupon A. placed blinds upon his land close upon the windows, so as entirely to obstruct the view from them. He also erected buildings on the strip of land in the rear of both houses; and B. filed his bill to compel him to remove such buildings and blinds, setting forth that by the contract of sale, A. was restricted from building upon the land between the houses, and obstructing the light of the vendor, but that such restriction was omitted from the deed to A. by mistake. It appeared that A. agreed, as part of the consideration of the purchase, not to build upon the strip, but not that the privilege of light was reserved to his vendor. The Court held, though the proof shewed an agreement not to build upon any portion of the land, that the allegation in the bill

No relief
beyond the
allegations of
the bill.

(1) *Gort (Viscountess) v. Clark*, 18 L. T. (N. S.) 343; 16 W. R. 569; v. pl. 2, p. 101, *ante*.
(2) *Maguire v. Grattan*, Ir. R. 2 Eq. 246; 16 W. R. 1189.
(3) *Irvin v. Dixon*, 9 How. 10 (Amr.).

covered only the portion between the two houses, and that B. could obtain relief only as to that portion. A. was accordingly enjoined from erecting any building upon the part between the houses, but was not required to remove his buildings in the rear, nor the blinds placed before his vendor's windows (1).

70. A. applied for an injunction to restrain B. from the erection of his building, setting up in his bill an agreement that B. was to sell to A. that part of his lot lying in the rear of his own lot, that A. might enjoy light and air over the same. The injunction was granted, and afterwards, on B.'s motion on filing his answer, was dissolved. At the argument of this motion B.'s counsel, in explaining a diagram of the premises, said that B.'s building did not cover the entire rear of A.'s lot, and if A. would take down his privy he could enjoy light and air; A. did take down the privy, and put into the rear of his other buildings a range of fireproof windows; B. thereupon began the erection of a dead wall along the site of the privy; A. applied for an injunction restraining such erection. The Court held, that the declaration of B.'s counsel, *in facie Curie*, followed by A.'s acts, constituted a contract with the Court and with A., which estopped B. from denying the same and acting in denial of A.'s rights founded on that declaration, and an injunction was issued restraining the erection of the dead wall (2).

The declaration of defendant's counsel *in facie Curie*, followed by plaintiff's acts, constituted (here) a contract with the Court and with plaintiff, and estopped defendant denying the same.

71. The plaintiff leased to the defendant for eleven years a warehouse bounded on vacant land of A., "excepting and reserving (unto the plaintiff) the right to stop up and build against the five windows in said warehouse, which front upon" A.'s land, "and also to build against and put timbers into the wall on the side of said warehouse in which the said five windows are, at his pleasure." The defendant afterwards took a lease from A. of the vacant land for fifteen years, terminable by himself in ten years, and proceeded to erect a building thereon in contact with the wall of the warehouse containing the windows. Injunction refused, upon the grounds of a doubtful right; that the injury was trivial, or easily compensated in damages; that the plaintiff was a mere reversioner, having demised the warehouse to the defendant for a long term; and, further, that an injunction would be an ineffectual remedy

No injunction where right doubtful or injury trivial, or easily compensated in damages, and

(1) *Athey v. McHenry*, 6 B. Mon. 50 (Amr.)

(2) *Banks v. American, &c.*, 4 Sandf. (Ch.) 438 (Amr.)

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a statute
afforded a
remedy for
preventing
alleged en-
croachment
ripening into
a right.

without a decree compelling a conveyance from A. of the adjacent lot, and that an express statute afforded the plaintiff a simple and economical remedy for preventing the alleged encroachment from ripening into a right by adverse use (1).

SECT. 2. *Easements.*

1. Where a shop had been demised to the plaintiff "as the same was late in the occupation of C.," and during the occupation of C. the lessor, who occupied the adjoining house, had the right of using the flat roof of the shop for a garden, or any other purpose not injurious to the shop; Lord Justice Turner held (affirming the decision of Vice-Chancellor Sir W. P. Wood, Lord Justice Knight Bruce, *dissentiente*), that the assignees of the lessor had no right, without the consent of the plaintiff, to erect a photographic studio upon the roof of the shop, and the Court granted a mandatory injunction restraining the defendant from permitting the building to remain there (2).

Grantor can-
not claim
rights over
property
granted abso-
lutely, even if
continuous
and apparent
easements in
respect of
adjoining
tenements.

2. Mere knowledge of the manner in which property conveyed had been used by a vendor for the convenience of an adjoining tenement will not affect the purchaser if the property is conveyed without reservation; and a grantor cannot claim rights over property absolutely granted, even if such rights were, at the time of the grant, continuous and apparent easements enjoyed in respect of an adjoining tenement which remains the property of the grantor; and if an owner of two adjoining tenements conveys one of them to a purchaser absolutely, the tenement so sold is discharged from any quasi-servitudes to which it was subjected by the vendor during his ownership of both properties, and the purchaser is not bound to take notice of the manner in which the tenement purchased has been used for the convenience of the adjoining and unsold tenement. Therefore where, previously to 1845, the same person had been the owner and occupier both of a dock and of an adjoining wharf, and for many years the bowsprits

(1) *Atkins v. Chilson*, 7 Met. 398 (Amr.) & S. 261; 10 Jur. (N. S.) 858; 12

(2) *Martyr v. Lawrence*, 2 De G. J. W. R. 1043; 10 L. T. (N. S.) 677.

of the vessels brought into the dock had projected over the corner of the wharf, and but for this the dock could only be used for much smaller vessels; and in 1845 the wharf had been conveyed to G. without reserving any easement, and in 1846 the dock was sold to the plaintiff subject to a lease for twenty-one years from 1846, and the bowsprits of the vessels had from 1845 been suffered by the defendant, but not of right, to project over the wharf; upon a bill to restrain the defendant (who claimed under G.) from building upon the wharf in such a way as to prevent the bowsprits overhanging the wharf, Lord Chancellor Westbury held (reversing a decision of the Master of the Rolls, Sir J. Romilly, who had held, that on the grant of the wharf there was an implied reservation of the right to allow the bowsprits to overhang the wharf as they had previously done), that the easement claimed by the plaintiff was neither continuous nor apparent, and that he was not entitled to an injunction (1).

3. If a vendor of two adjoining tenements is subject to no liability as to a right of way through one of them by the tenant of the other, the purchaser of one tenement cannot enforce that right of way as against the other purchaser; so held by Vice-Chancellor Sir R. T. Kindersley, in a case where there were two tenants of adjoining premises held under the same landlord, and the tenant of one of the premises had acquired a right of way to his vaults through the adjoining vaults, and the landlord sold both premises at one sale, with a condition that they were to be subject to and with the benefit, as the case might be, of all subsisting rights or easements of way or passage so far as any lot might be affected thereby (2).

4. Where a party claims an easement, and proves only a part of his claim, the easement proved constitutes a different easement from the one claimed, and the claimant cannot obtain relief in Equity; and where a local board of health instituted a suit against an owner of a ditch for filling it up, thereby obstructing an ancient easement which the plaintiffs possessed in a flow of water through the ditch, and interfering with their right to its free use for sanitary

If vendor of two adjoining tenements is subject to no liability as to right of way through one by tenant of other, purchaser of one cannot enforce that right against purchaser of other.

Proof of an easement less than that claimed, disentitles to relief.

(1) *Suffield v. Brown*, 10 Jur. (N.S.) 111; 9 Jur. (N.S.) 999; 33 L. J. (Ch.) 249; 12 W. R. 356. (2) *Daniel v. Anderson*, 8 Jur. (N.S.) 328; 31 L. J. (Ch.) 610.

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purposes, and the plaintiffs claimed the easement with regard to the drainage of the whole district; whereas it appeared that, from the nature of the locality, the ditch could carry off only the surface-water, which collected on an undulating space of ground 114 yards in length; Vice-Chancellor Sir R. T. Kindersley dismissed the bill with costs, principally on the ground that the proper remedy for a board of health to resort to in such a case was under the 11 & 12 Vict. c. 63 (the Public Health Act, 1848) (1).

Wharfowner's rights under Thames Embankment Act, 1852, not having special easement in bed of river.

5. In *Macey v. Metropolitan Board of Works* (2) Vice-Chancellor Sir W. P. Wood held, that a wharfowner, who had not any special easement or privilege over the bed or soil of the river, but only the common right of passage to his property, had neither an easement over, nor a right in, land, within the enlarged definition given to that word by the 4th section of the Thames Embankment Act of 1862 (25 & 26 Vict. c. 93); and that a person so situate, therefore, whose land was not taken, but whose right of passage was injuriously affected by the works authorized by the 25 & 26 Vict. c. 93, had no right to compensation before those works were proceeded with; but that, having regard to the provisions of that Act, and of the various Acts incorporated therewith, his right to compensation arose when his damage was completed, and that his remedy was under the 68th section of the Lands Clauses Act, or by arbitration alone; and the Court also held, that where damage was occasioned to a party whose premises were not entered upon, but were injuriously affected by the exercise of the powers given by the same statute, and for which damage compensation was required to be made, the payment, ascertaining, or depositing of the amount of compensation was not a condition precedent to the commencement of the works which occasioned the damage (3).

The right to support of land immediately round a house is not an easement, but the ordinary right of enjoyment of property.

6. The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property; and till that is interfered with he has no legal ground of complaint, although, in fact, something may have been done which (without his knowledge) has occasioned results that will afterwards affect his property (4).

(1) *Felkin v. Herbert*, 1 L. T. (N. S.) 173.

(2) 10 Jur. (N. S.) 333.

(3) *Ib.*

(4) *Backhouse v. Bonomi*, 9 H. L. C. 503.

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7. Upon a bill filed by a railway company to restrain the defendant from removing the coal or water from underneath the land occupied by the plaintiffs' line of railway, and necessary to the stability of the Victoria Bridge over the River Wear, Vice-Chancellor Sir W. P. Wood held (and Lord Chancellor Campbell affirmed the decision), that, upon a conveyance of land for the express purpose of building, the right of working minerals being reserved to the vendor, the purchaser is entitled to support for his buildings, not only from underlying but adjacent soil, even though the conveyance was under the compulsory powers of a Railway Act, and an injunction was granted restraining the defendant from removing coal or other minerals from underneath the land purchased, or within twenty yards of any masonry or building belonging to the plaintiffs, unless, after notice pursuant to sect. 28 of their Act, the company neglected to deliver the declaration mentioned in that section (1). And although, as between conterminous owners, the lateral support of a neighbour's soil can only be claimed for the surface of the land in its natural state, yet where a person sells land to another to be used for an express purpose, he will not be allowed to derogate from his own grant by doing anything in the adjacent soil which unfits the land sold for the purpose for which it was sold, and it makes no difference that the land so sold was taken under compulsory powers (2). But the purchaser is not entitled to any additional support afforded by the accidental state in which the adjacent soil happens to be at the time of the purchase, however long it may have been in that state prior to the purchase; and therefore, where the owners of a drowned mine sold land to a railway company for the purpose of building a bridge, and the land sold derived additional support from the water in the mine, Vice-Chancellor Sir W. P. Wood held, that the railway company was not entitled to restrain him from pumping out the water, and restoring the mine to a working condition, although the mine had continued in its drowned state and the works had been abandoned for forty years prior to the purchase (3).

Upon conveyance of land for building, the right of working minerals being reserved, purchaser is entitled to support for his building from underlying and adjacent soil.

And the same right exists, though the conveyance is under compulsory powers of a Railway Act.

If a person sells land to another for an express purpose, he cannot derogate from his grant by doing in adjacent soil that which unfits the land sold for that purpose.—But purchaser not entitled to additional support afforded by accidental state of adjoining soil at time of purchase.

8. A landowner has a right, independently of prescription, to

Landowner has a right

(1) *North Eastern Railw. Co. v. Elliott*, 7 Jur. (N. S.) 6; 8 W. R. 603; 9 W. R. 172.
(2) *North Eastern Railw. Co. v. Elliott*, 6 Jur. (N. S.) 617.
(3) *Ib.*

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independently
of prescription
to lateral sup-
port of his
neighbour's
land.

the lateral support of his neighbour's land, so far as that is necessary to sustain his soil in its natural state, and also to compensation for damage caused, either to the land or to buildings upon it, by the withdrawal of such support. And where houses of the plaintiff were injured by mining operations of the defendant in an adjoining land, which would have caused the soil to subside without the additional weight of the houses, a decree was made for a perpetual injunction and for compensation (1). And the Vice-Chancellor, Sir W. P. Wood, said that, if it were necessary to determine the point of law, he must say that, having considered all the authorities, he found that, though there might be no very precise decision upon it, the *dicta* were strongly in favour of the plaintiff, who had contended that the landowner might, where the houses are ancient, acquire by twenty years' enjoyment the right to lateral support for the additional weight of buildings erected on the land (2).

9. Where a defendant had agreed to grant to the plaintiff, his heirs and assigns, the right to use certain roads and ways (delimited on a plan) "in and through his estate," Vice-Chancellor Sir J. Stuart restrained the defendant from making and continuing a wall then existing, or any other obstruction at the extremity of his estate, which obstructed the plaintiff from passing through the roads into the land of other landowners (3).

Where delay
in asserting
legal right,
and damage
slight, no
injunction
to restrain
infringement.

10. Where there is delay in the assertion of a legal right, and the damage is slight, the Court will not grant an injunction to restrain an infringement on the legal right; so held by Vice-Chancellor Sir W. P. Wood, in a case where a railway company had constructed its line so as to leave the passage for a private road two intervals of 9ft. 3in. each—the interval required by the Railway Clauses Act for a similar right of way being twelve feet. The plaintiff's right of way was not disputed; but he had lain by and allowed the railway works to proceed, and the damage accruing to the plaintiff in consequence was of small amount (4).

A lord may
drive carriages
under copy-

11. A lord may drive carriages along a tramway under copyhold of the manor, for the purpose of working mines within the manor,

(1) *Hunt v. Peake*, Job. 705.

affirmed 8 Jur. (N. S.) 999.

(2) *Ib.*

(4) *Wintle v. Bristol and South*

(3) *Phillips v. Treeby*, 3 Giff. 632,

Wales Union Railw. Co., 10 W. R. 210.

but not of working mines beyond its limits; and a bill will lie for an injunction at the suit of a copyholder to restrain the lord from using the tramway for the latter purpose, nor is it an objection to such a bill that the copyholder is not in possession of the surface, but has let it to a tenant (1).

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hold to work
mines within
the manor, but
not beyond.

12. Where a freeholder of land, which was let for building purposes, had entered into a covenant that the owners and occupiers of the houses should have a free right of way over certain roads, and should have full use and enjoyment of the roads in as absolute a manner as if they were public roads, but the roads had not been dedicated to the public; and at the invitation of the occupiers, but without the consent of the freeholder, a gas company had broken up the surface of the roads in order to lay down gas to some of the houses, and the freeholder filed a bill for an injunction against the company, but the occupiers of the houses to which gas had been already laid down not having been made parties, the cause was ordered to stand over for them to appear; and the occupiers appearing and consenting to the acts of the company, the Master of the Rolls (Sir J. Romilly) dismissed the bill with costs, holding that the occupiers were entitled to bring in the gas company and have the gas laid down; and that any attempt on the part of the freeholder to prevent the occupiers from having gas laid down by the company was a violation of his covenant (2).

13. Although a plaintiff may in an insignificant degree have obscured the light and air to his own dwelling, he is not thereby disentitled to an injunction to restrain a defendant from erecting a building so as seriously to diminish the supply of light and air (3).

Insignificant
obscuration of
light and air
by plaintiff,
does not dis-
entitle him to
relief from
serious diminution.

14. *Primâ facie*, the owner of land is entitled to the surface itself, and all below it, *ex jure naturæ*, and he who seeks to derogate from that right must do so by virtue of some grant or conveyance (4).

Primâ facie
owner of land
is entitled
to surface,
and all below
it, *ex jure*
naturæ.

(1) *Bowser v. Maclean*, 2 De G. F. & J. 415. peal, 31 L. J. (Ch.) 595.

(3) *Arcedeckne v. Kelk*, 2 Giff. 683.

(2) *Selby v. Crystal Palace District Gas Company*, 8 Jur. (N. S.) 422,

(4) *Rowbottom v. Wilson*, 8 H. L. C. 348.

affirmed by the Lords Justices on ap-

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Laches, and not instituting proceedings until building completed, disentitles to injunction.

A company is as much bound by acquiescence as an individual.

A party put upon inquiry has constructive notice of a right, and is bound by it.

15. If the parties complaining of an interruption in their enjoyment of an easement are guilty of laches (in this case one year and a quarter), and fail to institute proceedings to stop it until the new building has been completed, the Court will not grant an injunction to restrain the interruption, but will leave them to their remedy at Law (1).

16. A company is as much bound by acquiescence as an individual, notwithstanding the want of a formal contract; and where the plaintiff, a shipbuilder, being desirous of having a private communication with a railway, had entered into negotiations with the company for the construction of a tunnel at his own expense, and the directors expressed their assent generally to the project; and the plaintiff then, with the acquiescence of the company, and the approval of their engineer, had executed the necessary works, and the communication was used by the plaintiff, and tolls received by the company for two years and a half, but no formal agreement had ever been executed, the parties being unable to agree upon all the terms; and at the end of that time the company had given notice to the plaintiff that every agreement between them, if any ever existed, was at an end, and had proceeded immediately to stop up the communication: upon a demurrer to a bill filed for specific performance, and for an injunction, Vice-Chancellor Sir W. P. Wood held, that after all that had taken place the plaintiff had acquired a right of user which the company had no power to terminate, and that there was an indefinite agreement in 1855 for a user on reasonable terms; that the actual user had removed all difficulty about what terms were reasonable, and that the plaintiff was entitled to specific performance on the basis of the unsigned memorandum on the terms of which the user had been permitted (2).

17. Where a party is put on inquiry, and has thus constructive notice of a right, he is bound by it; and where A. sold to B. (the owner of the adjoining premises) the right of using two chimneys in A.'s wall, and the consideration was paid, and the chimneys were used for eleven years, but no grant was executed, and C. purchased A.'s house without notice of the right; but there being fourteen chimney-pots on the wall and only twelve flues in A.'s house.

(1) *Cooper v. Hubbuck*, 7 Jur. (N. S.) 457; 9 W. R. 352.

(2) *Laird v. Birkenhead Railw. Co.* Joh. 500; 29 L. J. (Ch.) 218.

the Master of the Rolls, Sir J. Romilly, on the ground of constructive notice, granted at the hearing of the cause an injunction to restrain him from stopping up the two chimneys; and also held that it was not necessary that the bill should pray for a specific performance, and that the absence of a grant was immaterial (1); and in this case a mandatory injunction had been granted by Vice-Chancellor Sir W. P. Wood, upon an interlocutory motion to compel the defendant to remove tiles which he had put on the top of the chimney-pots, the flues having been used by the plaintiffs for several years, although their right to them was at the time doubtful (2).

18. Where parties in possession of an easement filed a bill to restrain the owner of the land from proceeding with an action of trespass, alleging three grounds of defence to the action, two of which were legal and one equitable, the Court allowed the action to proceed to judgment; inasmuch as if the legal grounds of defence should be sustained, the interposition of the Court would be unnecessary, and if they should not be sustained, and it should therefore become necessary to entertain the equitable question, the Court would know what amount of damages a jury had assessed as a compensation for the easement, and be enabled to secure that amount until the hearing of the cause (3).

19. Where a conveyance to the plaintiff granted to him a right of way, through the gateway of the vendor (which opened into a close afterwards bought by the defendant), to a wicket-gate to be erected by the plaintiff at a given point, into a piece of garden-ground, part of the premises purchased by the plaintiff, and the plaintiff built a cart-shed on this piece of garden-ground close to the point where the wicket-gate was to be, and claimed a right of carriageway to it; the Master of the Rolls, Lord Romilly, held, that the plaintiff was not confined to a right of footway, but was entitled to a right of way for all purposes. The Master of the Rolls said there was nothing in the grant of the right of way to limit it to a right of way on foot, or to a horse, or to prevent him from driving a cart or carriage there, and that he was of opinion, on the construction of the deed, that it was meant to give the

(1) *Hervey v. Smith*, 22 Beav. 299.

(3) *Barnard v. Wallis*, Cr. & P. 85;

(2) *Hervey v. Smith*, 1 K. & J. 389. 2 Railw. Cas. 162.

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plaintiff a right of way for all purposes up to that particular point (1).

If customer is encouraged to erect works to which an easement is essential, an equitable right

20. Although that kind of understanding by which a customer, as long as he continues such, is allowed an easement does not confer on him an equitable right, yet he is entitled to reasonable notice before being deprived of his easement. But if the customer has been encouraged by the owner of the servient tenement to erect works to which the easement is essential, or nearly so, he will acquire an equitable right to the easement (2).

Adverse user by an individual of a public highway for more than twenty years is no bar to right of public.

21. The adverse user by an individual of a public highway, or any part thereof, for more than twenty years is no bar to the assertion by the public of their right over the highway, or the portion thereof so adversely used (3); and where, in 1811, a public road was set out across a common by inclosure commissioners of a width of fifty feet, and allotments of the land on either side of the road were at the same time made, but about twenty-five feet only of the fifty feet allotted by the commissioners had been used as the actual road, and the sides which were left uninclosed had become covered with furze and heath, and fir-trees had been allowed during the last twenty-five years to come up through the furze; and in 1868 the Highway Board commenced cutting down, and advertised a sale of some of these fir-trees growing within the fifty feet allotted by the commissioners in 1811 for the public highway; upon a bill by the owner of the land adjoining to restrain the board from such cutting, Vice-Chancellor Sir W. M. James held, that the right of the public was to have the whole width of the road, and not merely that part which had become the *via trita* by usage, preserved free from obstructions, and that such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years; and dismissed the bill with costs, but without prejudice to the right of action (if any) the plaintiff might have in respect of the removal of the trees for the purposes of sale (4).

(1) *Watts v. Kelson*, L. R. 6 Ch. 166; 18 W. R. 745; pl. 32, p. 22, *ante*.

(2) *Bankart v. Tennant*, 18 W. R. 639; v. pl. 10, p. 13, *ante*.

(3) *Turner v. Ringwood Highway Board*, L. R. 9 Eq. 418; 18 W. R. 424; 21 L. T. (N. S.) 745.

(4) *Ib.*

22. On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity (1). And where A. purchased from B. the lease of a house, part of an estate agreed to be let to B. upon building leases, and there was an open archway under part of the house, which was described as a gateway in the ground-plan of the house drawn on the lease, and which, when the buildings on the estate were completed in accordance with the plan of the building agreement, formed the only means of access to a mews behind the house, and at the time of the purchase, the buildings not being then completed, there were other means of access to the mews, and the assignment contained no reservation of a right of way, but the archway was used as an entrance to the mews until the buildings were completed; the Master of the Rolls, Lord Romilly, held, that a right of way through the archway was reserved to B. by implication, the state of the property at the time of the purchase being such as to put A. upon inquiry, and fix him with constructive notice of the building-plan; and that A. having stood by, and allowed B. to build so as to leave no other access to the mews, could not afterwards dispute the right of way (2).

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Purchase of land with notice that adjoining land is to be laid out so as to make a right of way necessary reserves, by implication, to vendor a way of necessity.

23. The lessee of an inner close has by necessity a right of way, suitable to the business for which the lease was made, over an outer close which belongs to the same landlord (3). But the lessee of one close cannot, as such, by user acquire an easement over another close which belongs to the same landlord (4).

Lessee of inner, has a way of necessity over outer close belonging to same landlord.

24. An easement, as a right of way or a right to light, may be abandoned, and it is always a question of fact to be ascertained by a jury, or by the Court, from the surrounding circumstances, whether the act amounts to an abandonment; but mere nonuser, in the absence of the acquisition of rights by other parties in consequence of it, does not amount to an abandonment; and unless other persons have been led into incurring expense, on the

An easement may be abandoned, but mere non-user is not abandonment—and easement may be resumed, unless others led to incur expense.

(1) *Davies v. Sear*, L. R. 7 Eq. 427; 38 L. J. (Ch.) 545; 17 W. R. 390; 20 L. T. (N. S.) 56. (3) *Gayford v. Moffatt*, L. R. 4 Ch. 133; *Pomfret v. Ricroft*, 1 Wms. Saund. 321, n. 6.

(2) *Ib.*

(4) *Ib.*

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Party-walls
are an ease-
ment, and
will be pro-
tected.

An easement
may grow
out of the
conveyance
of real pro-
perty for
specified
objects.

Threatened
appropriation
of land for
highway
restrained

impression that it was intended to abandon the right, it continues, and is merely suspended, and may be resumed (1).

25. Party-walls are an easement which may be protected by injunction. The owner of one-half of an ancient solid party-wall, long used for the support of buildings erected on each side of it, may be restrained by injunction from cutting away a portion of its face, and erecting a new wall upon his own land two inches distant from the portion of the old wall which is left standing, and connected with it by occasional projecting bricks and ties (2).

26. Another easement is that alleged to grow out of the conveyance or setting apart of real property for certain specified objects, which appropriation is alleged materially to affect the value of adjacent estates. But where, upon a sale of lots in a new town (U.S.), it was announced that certain pieces were set apart for church lots according to a plan, and a lot was conveyed to a church society by an ordinary deed; it was held, that the lot-owners had no such vested interest in restricting the use of the church lot as would maintain an injunction against a sale of a portion of it to raise money for building a church on the remainder (3). But where certain land within the limits of a city is by statute reserved for the use of the State for a court-house, jail, market, public worship, and burial, the public thereby acquire rights and interests in such land as a common or public square; and, although the legal title may be in the city, it holds subject to the trusts above named, and has no power to sell the land for private purposes: hence the Court will grant a perpetual injunction to restrain and prevent the erection of a private dwelling-house on such square, as an irreparable public injury. The application may be made by the Commonwealth at the instance of the Attorney-General (4).

27. An injunction lies for one in possession of land to restrain the threatened appropriation of such land for the purpose of a highway, where the proper steps have not been taken to secure a

(1) *Cook v. Bath (Mayor, &c.)*, L. R. 147; see *Zugenbuhler v. Gilliam*, 3 6 Eq. 177; 18 L. T. (N. S.) 123; *v. Clarke*, 391 (Amr.)

p. 49, ante, pl. 4; *Moore v. Rawson*, 3 B. & C. 332; *Stokoe v. Singers*, 8 E. 250; see *Macwell v. East, &c.* 3 Bosw. 124 (Amr.)

Crosley v. Lightowler, L. R. 3 Eq. 279. (4) *Com. v. Rush*, 14 Penn. 186

(2) *Phillips v. Boardman*, 4 Allen, (Amr.)

suitable compensation to the plaintiff, or to protect him from an improper appropriation (1); or to prevent the laying-out and establishing of a road through a farm and improvements without compliance with the requirements of the law (2); or in behalf of a person whose right to the use of a pass-way, already in existence, has been obstructed; though not where the establishment of a pass-way is claimed on the mere ground of necessity (3). So, it seems, an obstruction of a public street by fencing it may be restrained by injunction (4).

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until proper steps taken to compensate plaintiff.

SECT. 3. *Trespass.*

1. An owner of a mine seeking relief, and in this case by way of an injunction to restrain the defendant from working the mines in and under the plaintiff's colliery, and digging or removing the minerals therefrom, against the owner of an adjoining mine, for a trespass in working into his (the plaintiff's) mine, is, upon making out a *prima facie* case, entitled to an interlocutory order for the inspection of the mine of the defendant, the other owner; and the denial by the defendant of the trespass is not a sufficient ground for refusing the order, and it does not depend upon the balance of testimony; but the Court requires the best evidence of the fact, and the best evidence here is an examination of the workings in the defendant's mine, and the contradiction of the defendant amounts to nothing unless it can be shewn that a positive injury is sustained by him by being compelled to grant the inspection (5).

Owner of mine seeking relief against trespass is, upon making out *prima facie* case, entitled to inspection of defendant's mine.

2. Where a bill was filed praying for an injunction to restrain various acts of trespass committed against the plaintiff, and of annoyance to his tenants, by a pauper defendant, Vice-Chancellor Sir J. Stuart granted the injunction, as recovering damages at Law against a pauper did not constitute an adequate remedy (6).

Damages at Law against a pauper are not an adequate remedy for trespass, and he will be restrained.

3. The Court will not interfere to prevent trivial trespasses; The Court does not inter-

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| (1) <i>Anderson v. Commissioners, &c.</i> ,
12 Ohio St. 642; <i>McArthur v. Kelly</i> ,
5 Ohio, 140 (Amr.) | (4) <i>Langedale v. Bonton</i> , 12 Ind. 467
(Amr.) |
| (2) <i>Floyd v. Turner</i> , 23 Tex. 292
(Amr.) | (5) <i>Bennitt v. Whitehouse</i> , 28 Beav.
119; 6 Jur. (N.S.) 528; 29 L. J. (Ch.)
326. |
| (3) <i>Hall v. McLeod</i> , 2 Met. (Ky.) 98
(Amr.) | (6) <i>Hodgson v. Duce</i> , 2 Jur. (N. S.)
1014. |

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fers against trivial trespasses, and it interposes to enforce legal rights, or to prevent mischief until the right is ascertained.

and does not exercise its jurisdiction by injunction for the purpose of acting on legal rights, but interposes in order either to enforce legal rights, or to prevent mischief, until the time shall arrive when those legal rights may be ascertained (1).

4. On a bill to restrain the continuance of a trespass alleged to have been actually committed, the Court (Lord Cottenham, reversing Vice-Chancellor Sir J. Wigram's decision in that respect), in putting the plaintiff to his action, will not require the defendant to admit any fact that enters into the question of trespass, at least unless such fact be clearly and free from all doubt admitted in the answer (2).

5. Where A. demised certain lands to B., and for some years allowed B. and his under-tenants to cut turf out of a bog adjoining the lands demised, and some acres of the bog having been reclaimed, B. set them, alleging that they formed part of the lands demised by A.; and in 1836 A., by notice, demanded possession of the land reclaimed, and withdrew the permission to cut turf from the bog; and an ejectment being brought for the recovery of the reclaimed lands, and B. still continuing to cut turf as before, pending the ejectment A. filed a bill for an injunction to restrain him; the Court refused the injunction, as the case was not one of a sudden and irreparable injury, and therefore the Court would not interfere in a case of trespass (3)

6. In *Field v. Beaumont* (4) it is *queried* whether, after a verdict at law, in an action of trespass, the Court will grant an injunction against future trespasses in favour of parties who refused at the trial to produce documents necessary to a fair decision. The Lord Chancellor Eldon said that it might, upon the application for the injunction, be a subject of discussion in this Court what was to be the effect of a verdict in a mere action of trespass, on an equitable right, after such length of possession (here eight years).

7. Though the Court would not restrain an action of trespass against a company, by a party through whose estate a canal was

(1) *Saunders v. Smith*, 3 My. & Cr. 711.

(2) *Beaufort (Duke of) v. Morris*, 2 Ph. 683.

(3) *Sandys v. Murray*, 1 Ir. Eq. Rep. 29.

(4) 1 Swan. 210.

cutting, for deviating from the line, because he had lain by and rested upon his legal rights; yet if he filed a bill to restrain their deviating, and then moved to commit them, the Court would not do so without a trial by jury in a disputed case, and directing an issue at Law (1).

8. In *Kinder v. Jones* (2), in a case of trespass, the defendant claiming to be entitled to trees, as standing on part of the waste of a manor of which he was the lord, and threatening to cut down the trees alleged by the plaintiffs to belong to them, and on land (a lane) alleged to belong to the plaintiffs and to be extremely ornamental to the mansion-house and park; the Court granted an injunction, although the title was disputed (the defendant not appearing). But where, on a bill stating the intent of the defendant to encroach on the plaintiff's land, &c., by building, the defendant by his answer claimed title to land himself, a motion for an injunction was refused, on the ground that there was not sufficient to try the title on (3).

9. In *Flamang's Case* (4), where a lessee for life committed waste (from the privy) by opening a mine in his own close, and dug a mine in the adjoining close of the lessor, not comprised in his lease, Lord Thurlow granted an injunction as to both closes; Lord Thurlow hesitating much as to granting the injunction in respect of the lessor's close, but at last granted the injunction: first, from the irreparable ruin of the property as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of this Court enjoining in matters of trespass where irreparable damage is the consequence. But in *Mogg v. Mogg* (5) an injunction was refused by Lord Chancellor Thurlow, where a defendant, not having or claiming any right or interest, cut down timber on the estate, being a mere trespasser; and being such, an action of trespass would lie against him. And in *Courthope v. Mapplesden* (6) Lord Chancellor Eldon granted an injunction against a trespasser cutting timber by collusion with the tenant, without prejudice to the case of mere

The Court enjoins in trespass where irreparable mischief is the consequence.

(1) *Agar v. Regent's Canal Company*,
Coop. 77.

(2) 17 Ves. 110.

(3) *Bateman v. Johnson*, Fitzg. 106.

(4) Cited in *Hanson v. Gardiner*,
7 Ves. 308; 6 Ves. 147; 8 Ves. 90;
18 Ves. 186.

(5) 2 Dick. 670.

(6) 10 Ves. 290.

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trespass; and the Lord Chancellor said that he had no difficulty in granting the injunction in this case, but that he would not be bound as to what was to be done upon a mere trespass; though he said it was strange that there could not be an injunction in that case to prevent irreparable mischief; the rather as there was a writ at Common Law to prevent the further commission of waste during the trial; whereas, if the Court would not interfere against a trespasser, he might go on by repeated acts of damage, perfectly irreparable, but that the ground in this case was, that the trespass partook of the nature of waste more than in general cases, the tenant including; and that if the tenant's act was waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction. But in *Hamilton v. Worsefold* (1) (decided after *Mogg v. Mogg* (2)) upon a bill stating that the plaintiff was seised in fee; that his title had but recently accrued, and the tenants had not yet paid him any rent; that the defendant Worsefold pretended to have some claim to the estate, and had given notice to the tenants to pay their rent to him; that he had entered upon the estate with the permission of the other defendants, the tenants, and had cut timber, and threatened to cut more; and praying that Worsefold might be restrained from committing waste, and that the tenants might be restrained from permitting it; Lord Chancellor Thurlow, upon the motion for the injunction, at first had some difficulty about granting the injunction, Worsefold being a mere trespasser, but at length his Lordship granted the injunction against both Worsefold and the tenants. In *Thomas v. Oakley* (3), the jurisdiction against waste by injunction and account was applied to trespass by exceeding a limited right in the defendant, who had an estate contiguous to the plaintiff's, to enter and take stone from a quarry for building upon a particular part of his (the defendant's) estate, by taking stone to a considerable amount for the purpose of using it upon the other part of his estate, being a destruction of the inheritance, as in the case of timber, coal, or lead-ore, and the distinction between waste and trespass was therefore disregarded. In *Crockford v. Alexander* (4) Lord Chancellor Eldon granted an injunction against cutting timber in the case of trespass, viz., by a

Court enjoins
in trespass
where there is
a destruction
of the inher-
itance.

(1) 10 Ves. 290, n. (cited in the case last above-mentioned).

(2) *Supra*.

(3) 18 Ves. 184.

(4) 15 Ves. 138.

person having got possession under articles to purchase. And in *Earl Couper v. Baker* (1) Lord Chancellor Eldon granted an injunction against trespass upon irremediable mischief in the nature of waste, on a bill by the lord of the manor and his lessees against the defendants, who had dredged and otherwise collected large quantities of stones having a peculiar value, found at the bottom of the sea, within the limits of the manor. In *Mitchell v. Dors* (2) an injunction was granted where the defendant having begun to take coal in his own land had worked into that of the plaintiff; Lord Chancellor Eldon said, that was trespass, not waste; but that he would grant the injunction upon the authority of a case before Lord Thurlow, where a person, landlord of two closes, had let one to a tenant, who took coal out of that close, and also out of the other, which was not demised; and that the difficulty was, whether the injunction should go as to both; and that it was ordered as to both. But where an injunction had been obtained on affidavits against pasturing cattle and cutting in a wood, and the plaintiff prayed the injunction as tenant in fee, or as lord of the manor inclosing under the statute, and the defendants denied the former title, and as to the latter claimed common of pasture and estovers, and stated that after the enclosure sufficient common of pasture would not be left; and the plaintiff having, before the bill was filed, been nonsuited in an action of trespass, and having entered into an agreement with some of the tenants: upon the plaintiff pressing to have the injunction continued until the hearing, and to have two issues directed—first, to try the right of the defendants as commoners; secondly, whether, supposing the wood inclosed, there would be sufficient common left for the tenants—the injunction was dissolved upon the answer, on the ground that, instead of filing a bill in the first instance, and submitting to this Court to regulate the enjoyment in the meantime, the plaintiff went first to Law, and having failed there, came here, not to establish his right at the hearing, but to prevent their enjoyment till the hearing; and Lord Chancellor Eldon observed that if there was any hardship, it was better that it should fall on the

(1) 17 Ves. 128.

Northumberland, 17 Ves. 281; pl. 13,(2) 6 Ves. 147; *v. Grey v. Duke of* p. 30, *ante*.

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plaintiff than upon the defendants (1). And where the lord inclosed part of the common, insisting by his bill that it was an improvement within the Statute of Merton, and that he had left sufficient common for the tenants, and the tenants threw open the inclosure by force; the Court, upon the principle of avoiding multiplicity of suits, granted an injunction; and at the hearing directed an issue whether the defendant had a right of common, and whether sufficient common was left, and the injunction was continued in the meantime (2). And the Court will, by mandatory injunction, restrain a trespass the continuance of which will inflict irreparable damage upon persons in possession; and damage which it is impossible to measure will be deemed irreparable. And where a bill was filed to restrain a railway company from placing an obstruction (a barrier, or strong wooden fence) partly on a public footway and partly on land belonging to the plaintiffs, a rival railway company, so as to block up the access to a station of the plaintiffs, and the bill alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the act was done without any colour of title by the defendants; Vice-Chancellor Sir W. P. Wood held, upon demurrer, that this was one of the exceptional cases in which the Court would interfere to restrain a trespass by a stranger (3).

Trespass by stranger restrained (here).

The Court will enjoin a trespass continuing so long as to become a nuisance.

Sporting in a royal forest restrained (here).

Trespass not restrained unless trespasser insolvent, or irre-

10. In *Coulson v. White* (4) Lord Chancellor Hardwicke said that every common trespass was not a foundation for an injunction in this Court, where it was only contingent and temporary; but that if it continued so long as to become a nuisance, the Court will grant an injunction to restrain the person from continuing it.

11. Where a receiver had been appointed in a creditors' suit, of the office of Master Forester of a royal forest, an injunction was afterwards granted to restrain certain persons who owned lands in the forest from sporting in it (5).

12. An injunction will not be granted to restrain a trespass, unless the trespasser is insolvent, or the injury irreparable and destructive to the plaintiff's estate—to its very nature and sub-

(1) *Hanson v. Gardiner*, 7 Ves. 305.

(2) *Arthington v. Fawkes*, 2 Vern.

356.

(3) *London and North Western Railw.*

Co. v. Lancashire and Yorkshire Railw.

Co., L. R. 4 Eq. 174; 17 L. T. (N. S.)

43; 15 W. R. 810; *v. Lowndes v. Bettk*,

ante, p. 131.

(4) 3 Atk. 21.

(5) *Blanchard v. Cawthorne*, 6 Sim.

155.

stance—and such as calls for immediate relief (1), at least until the right is determined (2). There must be something particular or special in the case, for which a Court of Law cannot afford adequate redress, and for which, either from difficulty of proof or some other cause, the party cannot obtain adequate satisfaction in the ordinary course of law (3). “The interference of a Court of Equity, by injunction, in a case of trespass to land, and where an action at law will lie, is of modern origin, and an exercise of power to be justified only in a case of great and irreparable injury. Doubtless, too, the petitioner who invokes it, in conformity with principle and precedent, should shew at least a strong *prima facie* case of right” (4). But the Court may grant an injunction if the trespass should continue so long as to become a nuisance or a constant grievance (5), or in cases of repeated acts and trespasses (6); as where, in asserting a public right of way by dedication, one repeatedly tore down fences on the land of another—as the acts, if allowed, might furnish ground for such claim (7).

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irreparable injury, or right determined, or something special in the case for which Court of Law cannot afford an adequate remedy. And there must be a *prima facie* case of right.

Trespass enjoined if trespass becomes a nuisance or continuous grievance, and where repeated acts and trespasses.

13. In a bill to enjoin a trespass, and also for specific performance, if the answer disproves the equity as to the agreement, but admits the trespass, the Court will not dissolve the injunction (8).

14. Where the plaintiffs asserted their right to certain mining claims, and complained of the defendant's unlawful intrusion therein, and an injunction had been granted restraining certain acts of trespass done and threatened; it was held that the suit was substantially for trespass, and that the injunction was in aid of the suit, and could not be continued after a verdict had been rendered for the defendants (9).

An injunction restraining trespass cannot be continued after a verdict for the defendant.

(1) *James v. Dixon*, 20 Miss. 79; Foster, 6 Eng. 304; *Wilson v. Hughell*, 1 Morr. 461; *Catching v. Terrell*, 10 Geo. 576; *Shipley v. Ritter*, 7 Ind. 408; 5 Geo. 576; 26 Miss. 84; *Centreville, &c. v. Barnett*, 2 Cart. 536; *Brooks v. Diaz*, 35 Ala. 599 (Amr.)

(2) *Schurmeier v. St. Paul, &c.* 8 Min. 113; *Whitman v. St. Paul, &c.* 1b. 116 (Amr.)

(3) *Bethune v. Wilkins*, 8 Geo. 118; *Anthony v. Brooks*, 5 Geo. 576; 10 Geo. 576; *The Justices, &c. v. The Griffin, &c.* 11 Geo. 246; 26 Miss. 84

(Amr.)

(4) *Per Butler, J., Fulla, &c. v. Tibbets*, 31 Conn. 168 (Amr.)

(5) *Whitfield v. Rogers*, 26 Miss. 48; 7 Ind. 408; *Moore v. Ferrell*, 1 Kelly, 7 (Amr.)

(6) *Schetz's, &c.* 35 Penn. 88 (Amr.)

(7) *Carpenter v. Gwynn*, 35 Barb. 395 (Amr.)

(8) *The Justices, &c. v. The Griffin, &c.* 11 Geo. 246 (Amr.)

(9) *Brennan v. Gaston*, 17 Cal. 372 (Amr.)

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There is no right in a name entitling to an injunction to restrain the use, except in connection with trade.

SECT. 4. *Name.*

1. There is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another, but it is otherwise as to the exclusive use of the name in connection with a trade or business: this right is recognised, and it is a fraud on the part of any one to assume it, colourably or otherwise, that being an invasion of another's right, and there is a remedy either at Law or in Equity against such a fraud (1).

2. Vice-Chancellor Sir J. Stuart refused an injunction, on behalf of a corporation called "The London Assurance," to restrain "The London and Westminster Assurance Corporation (Limited)" from using the latter title (2).

SECT. 5. *Publishing, Printing, and Selling—Publication of Proceedings in Courts of Justice—Publication of Letters.*

The Court will punish as for a contempt those making the publication of its proceedings the vehicle of a libel, but will not undertake to restrain publication of every unfair report.

1. The Court will punish, as for a contempt, those who make the publication of its proceedings the vehicle of a libel; but although it has the power of restraining the publication of its proceedings pending litigation, it will not undertake to restrain the publication of every unfair report purporting to represent what takes place in open court. B. & Co. obtained a patent entitling them, as the inventors of a new mode of preparing thread, to use the term "glacé" or "patent glacé." They ascertained that the defendants were selling thread by the name of "patent glacé," and after a correspondence between the parties, B. & Co. filed a bill to restrain them from using the term. The Court directed a motion for an injunction to stand over, with liberty to the plaintiffs to bring an action. The plaintiffs published a report of the proceedings on the hearing of the motion; this report, which was substantially correct, stated that it was established in evidence that the plaintiffs

(1) *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430; 17 W. R. 594; 38 L. J. (P.C.) 35; 6 Moo. P. C. C. (N.S.) 31; 22 L. T. (N. S.) 228; *v. ante*, p. 347; *et v.*

Hilliard, Inj. p. 501, n., 2nd Ed.

(2) *London Assurance v. London and Westminster Assurance Corporation*, 32 L. J. (Ch.) 664.

were the first to use the word or trade-mark in question, and that the Court had refused to grant the injunction in the first instance on the ground of acquiescence. The defendants moved to restrain the publication of the report, on the ground that it was untrue, the fact being, that evidence was not gone into on the motion, and that it would have the effect of obstructing justice and prejudicing their case, and tended to influence the public mind, and was libellous and a contempt of Court. But upon the hearing of the motion, Vice-Chancellor Sir J. Stuart, and upon appeal the Lords Justices, considered that the publication, though unfair, was not a libel, and not such as would obstruct the course of justice, and therefore refused the motion (1). And where proprietors of a newspaper had dissolved partnership, and one of them (the defendant) had agreed to purchase the plaintiff's interest, and before completion, and pending a suit for specific performance, the purchaser published statements as to the profits and loss of the paper in order to establish a company to carry it on; the Master of the Rolls, Sir J. Romilly, refused a motion for an injunction to restrain him from publishing such statements (2). But pending litigation the Court will restrain the publication by any of the parties to the suit of *ex parte* garbled accounts, calculated to prejudice the case of their opponents, of any of the proceedings in Court or before the examiner. The circumstance that such publication is by way of defence, and in answer to similar publications by the other side, although it may excuse the party sought to be restrained from the costs of the motion for that purpose, will not prevent the Court from granting the injunction (3).

Pending litigation, Court will restrain publication by parties to suit of *ex parte* garbled accounts calculated to prejudice opponent's case, and it is no defence that it is done by way of answer.

2. The Court will restrain the publication of facts contrary to agreement (4). Where, A. being indebted to the defendant, an agreement was entered into by which judgment for the debt was to be signed, but not entered up, against A. for securing payment by instalments, the defendant agreeing not to enter up judgment (so as to get in the 'Tradesman's Circular'), nor publish it in any way, but shortly afterwards he threatened to sell the judgment-debt

Court will restrain publication, contrary to agreement, of facts.

(1) *Brook v. Evans*, 6 Jur. (N. S.) 501.

1025; 29 L. J. (Ch.) 616; 8 W. R. 688;
3 L. T. (N. S.) 571.

(2) *Marshall v. Watson*, 25 Beav.

(3) *Coleman v. West Hartlepool Railw. Co.*, 8 W. R. 734.

(4) *Anon.* 3 Jur. (N. S.) 685.

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at a periodical sale, which would necessarily involve, by advertisement, the publication of A.'s indebtedness; Vice-Chancellor Sir W. P. Wood, being of opinion that this threat was not *bonâ fide* for the purpose of sale, but for getting better terms from A., restrained such publication by injunction; and A. having in the first place obtained an *ex parte* injunction, and the defendant having offered immediately, and before further expenses were incurred, to submit to a perpetual injunction, but refused to pay the costs, and A. thereupon brought the matter to a hearing, the Court held, that he was entitled to the costs to the hearing (1).

A plaintiff obtaining information from production of documents will be restrained publishing it.

3. A plaintiff obtaining information from the production of documents in the defendant's possession, is not at liberty to make it public, and an injunction will, if necessary, be granted to restrain him; and it being put in evidence by the affidavits of the defendants that the plaintiff had, pending the suit, published prejudicial statements relative to the matters stated in question in the suit, the Court, as a condition for making an order for production of documents, required the plaintiff to undertake "not to make public or communicate to any stranger the contents of such documents" (2).

Court refused to restrain publishing a work until defendant had paid agreed sum for assistance by plaintiff.

4. Where the plaintiff had contracted to correct and complete, from materials to be furnished by the defendant, a book which the defendant expressed his intention to write, and agreed also to supply the legal information connected with the subject, for which the plaintiff was to be paid a certain remuneration, according to the number of pages the work might contain, the Court refused an injunction to restrain the defendant from printing, publishing, or selling the legal part of the work (which the plaintiff had contributed), with any material alteration or omission, and also refused an injunction to restrain the defendant from printing, publishing, or selling the work until he had paid the plaintiff the sum agreed upon for his assistance and contribution; for such payment may be enforced at Law, and the title to it is not a ground for the interposition of a Court of Equity (3). And, *semble*, unless there be a special contract, either express or implied, reserving to the author

Purchaser of a MSS. may alter and deal

(1) *Jamieson v. Teague*, 3 Jur. (N. S.) 1206.

(2) *Williams v. Prince of Wales Life Company*, 23 Beav. 338.

(3) *Cox v. Cox*, 11 Hare, 118.

a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper (1).

with it as he
thinks proper,
semble.

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5. Where there are two rival works, the Court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work (2).

Court will
restrain
advertising
one rival
work so as to
induce public
to believe it
the other,
but will not
restrain dis-
paraging
advertisements of the
other.

6. The right and property of an author or composer of any work, whether of literature, art, or science, in such work, unpublished, and kept for his private use or pleasure, entitles the owner to withhold the same altogether, or so far as he may please, from the knowledge of others; and the Court will interfere to prevent the invasion of this right by the publication of a catalogue containing a description of such work (3). And where a bill filed by A. against C., stated that A. and B. had together made various etchings for their own amusement, and without any view to publication, and that C. had improperly and surreptitiously obtained impressions of those etchings, and had printed and advertised for sale a catalogue of the etchings; upon affidavits in support of the bill, an injunction was granted to restrain C. from publishing the catalogue. C. put in an answer, in which he stated that he believed that the impressions had not been improperly obtained, but did not suggest any mode in which they could have been properly obtained; upon a motion by C., after answer, for dissolving the injunction, it was ordered that the injunction should be continued (4). And C., having at the suit of A. and B. submitted to an injunction restraining him from publishing the etchings, the work of A. and B. respectively, was not allowed to object to an injunction, granted on the application of A., restraining the publication of a catalogue or description of the etchings, on the ground that it is too extensive, as not clearly identifying which of such etchings belong exclusively to A. (5). And where a party obtains possession by purchase of impressions of etchings, the plates of which are the property of another, knowing that the vendor had obtained such impressions

Publication of
a catalogue
containing a
description
of any work
of literature,
art, or science
unpublished,
restrained.

Party obtain-
ing impres-
sions of
etchings, the
plates of

(1) *Cox v. Cox*, 11 Hare, 118.

(2) *Seeley v. Fisher*, 11 Sim. 581.

(3) *Prince Albert v. Strange*, 1 Mac.

& G. 25; 1 H. & Tw. 1; 2 De G. &

Sm. 665; 3 Jur. 507.

(4) *Ib.*

(5) *Ib.*

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which are another's property, with knowledge that they were obtained by breach of trust, will be ordered to deliver them up.

Third persons restrained publishing lectures substantially reduced into writing, orally delivered. Person attending lectures cannot publish them.

No injunction to restrain piracy of lectures delivered orally, unless written lectures produced substantially the same.

Partner in a patent not restrained publishing an account of invention.

through a breach of trust, the Court will interfere by injunction, and, without giving him the right to try the question of property at Law, will order the impressions to be delivered up; and where the material on which the impressions are taken, as in this case, are substantially worthless, except for that in which the possessor had no property, viz. the impressions, the Court will order their destruction (1).

7. An injunction will be granted against third persons publishing lectures orally delivered (which have been substantially reduced into writing), who has procured the means of so doing from persons who attended the oral delivery, and were bound by the implied contract (2); and a person who attends oral lectures is not justified in publishing them for profit, and an action will lie against him for doing so (3). But *quære*, whether there is any legal right of property in the sentiments and language of a lecture delivered orally, and which cannot be shewn to have been reduced into writing? (4). But persons who attend oral lectures, though not reduced into writing, and whether pupils or otherwise, will be restrained from publishing them, such publication being a breach of trust and violation of confidence (5). Where the Court is called upon to restrain publication, on the ground that it is a piracy of a composition which has been substantially reduced into writing, it is the duty of the Court to see that the plaintiff produces his written composition (6); and an injunction will not be granted to restrain an alleged piracy of lectures delivered orally, when no written composition, substantially the same with these lectures, is produced (7).

8. The Court will not restrain one of the several partners in a patent from publishing a book containing an account of the invention (8).

(1) *Prince Albert v. Strange*, 1 Mac. & G. 25; 1 H. & T. 1; 2 De G. & Sm. 665; 3 Jur. 507.

(2) *Abernethy v. Hutchinson*, 1 H. & Tw. 28.

(3) *Ib.*

(4) *S. C.* 3 L. J. (Ch.) 209; 1 H. &

Tw. 28.

(5) *Ib.*

(6) *Abernethy v. Hutchinson*, 3 L. J.

209.

(7) *Ib.*

(8) *Hawkins v. Blackford*, 1 L. J.

(Ch.) 142.

9. Where letters written by the plaintiff to the defendant had been returned by him, with a declaration that he did not consider himself entitled to retain them, the Court restrained the publication of copies taken before the return, without the knowledge of the plaintiff, though represented by the defendant as necessary for the vindication of his character. The jurisdiction to restrain the production of letters is founded on a right of property in the writer (1). But the Court will not grant an injunction to restrain the publication of letters on a principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the Court (2); and the publication of letters may be restrained, although not designed for profit (3). But the acts of the party may supply reasons for not restraining the publication of letters (4), and the Lord Chancellor (Lord Eldon) also ruled that the persons receiving letters may destroy them (5).

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Publication
of letters
restrained.

The jurisdiction
is founded
on a right of
property in
writer.

10. In *Granard v. Dunkin* (6) the Court granted an injunction, on the application of the executor, to restrain the defendant from publishing letters the property of the testator. And in *Thompson v. Stanhope* (7), the Court granted an injunction to restrain the executor of the person to whom they were written from publishing private letters without leave of the executors of the persons who wrote them. But in *Gee v. Pritchard* (8) Lord Chancellor Eldon expressed his doubts relative to the jurisdiction of this Court over the publication of letters, but said that he would not unsettle doctrines settled for forty years together; and that if he was called upon to lend his assistance to unsettle these doctrines, on any doubts he might entertain, he would lend it only when the parties brought them into question before the House of Lords.

Executor
may restrain
publication
of testator's
letters.

Executor of
person to
whom letters
written
restrained
publishing
them.

11. Upon a motion to restrain the defendants from printing, publishing, or selling a poem ('Wat Tyler'), and from causing the same to be printed, published, or sold, the Court refused an injunction to restrain the publication of the work until after the plaintiff should have established his right to the property by an action, on the ground

(1) *Gee v. Pritchard*, 2 Sw. 403.

(2) *Id.* 413.

(3) *Id.* 415.

(4) *Id.* 427.

(5) *Id.* 418.

(6) 1 Ball & B. 207.

(7) Amb. 737.

(8) 2 Sw. 422.

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that it had been left for twenty-three years by the author in the hands of the bookseller, to whom it was originally sent, with an intention of its being published, although that intention was afterwards relinquished. The work had passed into the hands of the defendant, who published it without the consent or privity of the author (1). But in *Macklin v. Richardson* (2) the Court granted an injunction to restrain the publishing in a magazine of a farce occasionally suffered by the author to be acted, but never printed or published. However, now, under the 5 & 6 Vict. c. 45, s. 20 (An Act to amend the Law of Copyright), it is enacted that the first public representation or performance of any dramatic piece (or musical composition) shall be deemed equivalent, in the construction of that Act, to the first publication of any book.

No injunction
to restrain
publication
of work,
where, from
its nature, no
action lies
upon it for
damages.

12. The Court will not interfere by injunction, upon the author's application, to restrain the publication of a work which is of such a nature as that an action could not be maintained upon it for damages (1).

13. Upon a bill stating that, in pursuance of an order of the House of Lords, dated the 12th of June, 1806, that the Lord Chancellor should give orders for the printing and publishing the trial of Lord Melville, and the several questions put to the judges, and their answers, and that no other person should presume to publish the same; the Lord Chancellor appointed the plaintiffs to print and publish the whole proceedings in the House of Peers upon the impeachment, and forbade any other person to print and publish the same; and further stating that the plaintiffs were employed by the House of Lords to take down the trial in shorthand, and had, at a considerable expense, been preparing to publish it, and that the defendants had published a work purporting to be the trial of Lord Melville; and praying an account and injunction. On a motion for an injunction, the Lord Chancellor, Lord Erskine, said that upon the case of *Bathurst v. Kearsley* (Easter Term, 1756, in Chancery), which could not be distinguished from this, and the practice of the House of Lords, uniformly asserting its authority to exercise the privilege (i.e., of appointing a person by similar orders to that under which the plaintiffs acted, with the prohibition of publications by other persons), he might grant the injunction, but that he did it, not

(1) *Southey v. Sherwood*, 2 Mer. 435.

(2) Amb. 694.

upon anything like literary property, but upon this only, that the plaintiffs were in the same situation, as to this particular subject, as the King's printer, exercising the right of the Crown as to the prerogative copies, and that he should not state anything as to other Courts, but should act upon that precedent, which he carried no farther than by granting an injunction to the hearing, and on a subsequent occasion said he desired that it should be understood that he had not delivered any judgment in this case further than by granting the injunction until the hearing, upon the precedent of *Bathurst v. Kearsley*, and should therefore consider the question as open in any future stage. A demurrer was afterwards put in, but it was never argued, a compromise taking place.

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14. In *Hogg v. Kirby* (1) Lord Eldon granted an injunction to restrain publishing a magazine as a continuation of the plaintiff's magazine in numbers, and from printing or publishing communications or letters admitted by the answer to have been received from correspondents by the defendant while publishing for the plaintiff; but it was held that the defendant was not prevented publishing an original work of the same nature, and under a similar title (2).

Publication of
a magazine as
a continuation
of plaintiff's,
restrained—
also the pub-
lication of cor-
respondence.

15. Where a voyage of discovery has been executed, and a narrative of it prepared under the orders of the Crown, the narrative is the property of the Crown; but on a bill by a publisher authorized by the secretary to the Board of Admiralty to publish such a narrative, the profits remaining at their disposition, an injunction restraining publication by a stranger was dissolved, as, so far from establishing any right to a monopoly in himself, the plaintiff stated the use of it to be in the defendants, the Lords of the Admiralty (3).

16. In *Duke of Queensberry v. Shebbeare* (4) the Court, on a bill by the representatives of the Earl Clarendon, granted an injunction to restrain the printing of an unpublished MS., viz., his 'History of the Reign of Charles the Second,' a copy of which had been by the representative of the author given to a person under whom the defendant claimed, but not with the intention that he should publish it.

17. The Vice-Chancellor of England, Sir L. Shadwell, held upon the construction of the 5 & 6 Vict. c. 45, s. 18 (An Act to amend

The proprietor
of an Encyclo-
pædia cannot

(1) 8 Ves. 215.

(2) *Ib.*

(3) *Nicol v. Stockdale*, 3 Sw. 687.

(4) 2 Eden, 329.

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publish in a separate form an article written for the Encyclopædia.

Extracts from a farce for purposes of a criticism, not (here) sufficient to justify granting an injunction.

Printing a brief before the cause comes on, to prejudice the world, is a contempt.

The register of protest for non-acceptance, &c., of bills of exchange, &c., under the Scotch Acts of 1681, &c., is a public document, and no interdict can be granted to restrain its publication.

the Law of Copyright) that the proprietor of an Encyclopædia, who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form, or otherwise than in the Encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the Encyclopædia for all purposes (1).

18. Where the defendant had, in two numbers of a periodical work of theatrical criticisms, inserted detached extracts, to the extent of six or seven pages, from a farce, the property of the plaintiff, containing forty pages interspersed with criticisms; a bill for a perpetual injunction, and an account of the profits of the numbers, which did not amount to £3, was dismissed with costs; the Master of the Rolls, Sir Thomas Plumer, being of opinion that the publication in which the plaintiff's work had been inserted being in the nature of a magazine or review, consisting of criticisms, and extracts to serve as a foundation for the criticisms, the defendant had not transgressed the allowed limits (which were not easily defined) (2).

19. Printing a brief before the cause comes on is a contempt of Court, not that the offence consists in the printing, for any man may give a printed brief, as well as a written one, to counsel; but the contempt of this Court is the prejudicing the world thereby with regard to the merits of the cause (3).

20. In *Fleming v. Newton* (4), a case of Scotch Law, the House of Lords held that the register of protest for non-acceptance and non-payment of bills of exchange and promissory notes, established by the Scotch Acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, was a public document to which everybody had a right of access, and that the publication thereof in a printed paper does not constitute a libellous publication; and where a person whose name was upon this register applied to the Court of Session for an interim interdict to prevent, so far as his own name was concerned, the publication of a copy of the register, and the Court below decreed for the application; the House of Lords, reversing that decree, held that the interdict ought not to have been granted,

(1) *Bishop of Hereford v. Griffin*, 16 Sim. 190.

(2) *Whittingham v. Wooler*, 2 Sw. 428.

(3) The case of *Captain Perry*, cited 2 Atk. 471.

(4) 1 H. L. C. 363.

and also that the costs in the Court below should be given (1); and further, that an interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to the House of Lords (2).

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SECT. 6. *Secrets.*

1. A Court of Equity will not interfere on points of morals, except when they are mixed up with the administration of civil rights in property. But confidential communications involving fraud are not privileged from disclosure; and where, in answer to a bill for an injunction to restrain a former clerk of the plaintiffs from disclosing any of their dealings and transactions, the defendant stated that the plaintiffs were in the habit of conducting their business in a fraudulent manner, and specified a particular instance; and, in support of his answer, the defendant filed interrogatories for the examination of the plaintiffs as to the fraudulent transactions, which they declined to answer; on exception to the answer, Vice-Chancellor Sir W. P. Wood held that there was no privilege to protect them from answering, the discovery being material to support the defendant's answer, which, if proved, would be a complete defence to the bill (3).

No interference in points of morals, unless connected with civil rights in property. Confidential communications involving fraud are not privileged.

2. Where a party had obtained the knowledge of a secret from one of the former partners in a trade, in breach of confidence, the Lords Justices—confirming the decision of Vice-Chancellor Sir G. J. Turner upon an interlocutory motion—restrained him from making use of it, the secret here being the compounding of a medicine, not being the subject of a patent, and restrained the sale of such medicine, the knowledge of the secret having been acquired in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence; the plaintiffs, by their counsel, undertaking to be answerable for damages or compensation, and subsequently the defendant submitted to an order making the injunction perpetual (4). The Vice-Chancellor said that he conceived that the Court, in interfering in such cases,

A secret of compounding medicine, obtained by breach of trust and confidence, will be protected.

(1) *Fleming v. Newton*, 1 H.L.C. 363. (N.S.) 39; 26 L. J. (Ch.) 113.

(2) *Ib.*

(4) *Morison v. Moat*, 21 L. J. (N.S.)

(3) *Gartside v. Outram*, 3 Jur. Ch. 248; affirming S. C. 9 Hare, 241.

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fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given the obligation of performing a promise upon the faith of which the benefit has been conferred (1).

3. If a partner in business, in which a secret process of manufacture and composition of materials is used, who has not, under the partnership contract, a right to the knowledge of the secret, should openly take part in the manufacture, and should, with the knowledge and concurrence of his partners, be permitted to acquire a knowledge of the process and ingredients; the Vice-Chancellor said that it would be difficult for any of those partners afterwards to restrain him from using any knowledge so acquired, or any secret so disclosed; they would, he thought, in such circumstances, be considered to have waived any right to preserve the secret for their separate benefit (2). In this case the injunction restrained the sale of medicine by the defendant, under the name of the medicine prepared according to the secret prescription, not on the ground of the use of the name alone, but because it was by the name that the defendant was availing himself of the breach of faith and contract. But *quære*, whether, apart from that ground of interference, the Court would have restrained the use of the name before the plaintiffs' right had been established at Law? (3)

4. A plaintiff not having the privileges of a patentee may have no title to be protected in the exclusive manufacture and sale of a medicine against the world; but he may, notwithstanding, have a good title to protection against a particular defendant (4).

Accountant
restrained
disclosing
secrets of his
employers.

5. The Court granted an injunction to restrain the disclosure of secrets obtained from the books and papers of the plaintiffs (a firm of attorneys), and of their clients, and come to the defendant's knowledge in the course of his employment as the plaintiffs' accountant, and from communicating any of the information possessed or acquired by him relating to the co-partnership, or the affairs or secrets thereof, or the clients thereof, by means of his having been so employed as above-mentioned (5).

(1) *Morison v. Moat*, 21 L. J. (N. S.)
Ch. 248; affirming S. C. 9 Hare, 241.

(2) *Ib.*

(3) *Ib.*

(4) *Ib.*

(5) *Evitt v. Price*, 1 Sim. 483; *Cholmondeley v. Clinton*, 19 Ves. 261

6. In *Bryson v. Whitehead* (1), Vice-Chancellor Sir J. Leach decreed specific performance of an agreement to sell the goodwill of a trade, and the exclusive use of a secret therein. The Vice-Chancellor said, that though the policy of the law would not permit a general restraint of trade, yet that a trader might sell a secret in business, and restrain himself generally from using that secret.

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Specific performance of agreement to sell a secret, &c., decreed.

7. Where the sole proprietor of a recipe for making a medicine assigned it, on the marriage of his daughter, to trustees in trust for her and her husband for their lives, and directed that after their decease it should be sold for the benefit of their children, and the mother destroyed the recipe, and verbally communicated the contents to the eldest son for the benefit of the other children; on a bill by some of the younger children against him, he was declared to hold the secret upon the trusts of the settlement, and was decreed to account for the profits made by the sale of the medicine after his mother's death; and, as a sale was impracticable, an issue was directed to ascertain the value of the secret (2).

A secret for making medicine held upon trust of a settlement.

SECT. 7. *Account.*

1. In the *South-Eastern Railway Company v. Brogden* (3), where a contractor having executed works for a railway company under two contracts, distinguished respectively as Contract No. 1 and Contract No. 3, had brought an action against the company for the works executed under Contract No. 1; and the company filed a bill to restrain this action, alleging that the plaintiff's demand depended on the result of complicated accounts, the company being entitled to various items of set-off, and that the account under Contract No. 1 was so blended with that under Contract No. 3, that what was due to the contractor could not be ascertained without taking both accounts; and the contractor, by his answer, denied any complication in the accounts, and that the accounts were blended, and he admitted the receipt of various sums in payment of works done

(1) 1 Sim. & S. 74. 398; S. C. *sub nom.* *Green v. Church*,

(2) *Green v. Folgham*, 1 Sim. & S. 1 L. J. (Ch.) 203.

(3) 3 Mac. & G. 8.

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If two accounts can be taken at Law, the blending of the two no ground for interference of Equity. But if claims are set up which cannot be properly decided at Law, Equity will restrain the action. Delay no ground for refusing interference where Court of Law cannot possibly deal with the matter.

under each of the contracts, and also of a large sum which, not being appropriated by the company, he had appropriated partly to one contract, partly to the other; and he also shewed that the several heads of set-off were free from all uncertainty, and then stated that there was work done the amount of which had not been ascertained, and other matters in respect of which he had claims on the company: the Court held, on appeal from an order of the Master of the Rolls granting an injunction, that, taking into account the explanations given in the answer, there would be no difficulty in the company proving at Law the claims of set-off under Contract No. 1, and that no case for equitable interference was established on this ground; but that before the contractor could recover anything under Contract No. 1, he would be obliged to prove that he had a demand exclusive of that contract, which justified his appropriation of that part of the sum received from the company which he had not appropriated to Contract No. 1; that thus the accounts under Contract No. 3 would have to be taken, and that in this way the accounts of the two contracts were blended; but that it being equally possible to take at Law, with justice to both parties, the accounts under Contract No. 3 as those under Contract No. 1, the blending of the two accounts formed no reason for withdrawing the case from the jurisdiction of a Court of Law; but that the other claims set up by the contractor in his answer were such as could not be properly decided in the action, and that therefore the injunction granted was proper, and that the delay of the company in filing their bill was no ground for refusing to interfere in a case where it was clear that the Court of Law could not possibly deal with the subject-matter (1). The Lord Chancellor (Lord Truro) said that he thought sufficient distinction had not (in the course of the argument) been made between cases where this Court would entertain jurisdiction over a matter of account, and where this Court would withdraw a matter of account from a Court of Law, and that there were many cases in which it seemed to him, looking through the whole of the decisions, that this Court would properly entertain jurisdiction on the matter where, if the party making the claim proceeded at Law, this Court would not, as a consequence, because it would itself exercise

(1) *South-Eastern Railw. Co. v. Brogden*, 3 Mac. & G. 8.

jurisdiction if appealed to, withdraw it from the jurisdiction of a Court of Law, and that he did not think the cases at all warrant that; and that it appeared that in certain cases, and where the account was of such a nature that it was thought justice could not be done at *nisi prius*, this Court would withdraw the matter, and would take the exclusive conduct and decision of the case, although it was a subject of legal jurisdiction, and the demands on both sides were of a legal nature; and that doing this, this Court would either itself decide the matter, or, if it be matter of law, and fit for the decision of a Court of Law, would put it into such a shape as to make the decision practicable, where it was thought not to be so in the general form in which the claim might have been obtained; and the Lord Chancellor held that, considering that the plaintiff's right to the injunction at all seemed to proceed on the ground that a Court of Law could not do justice between the parties, he had some difficulty in the application of the doctrine of delay, and where he was satisfied that the case was one of such a nature as to be quite impossible for a Court of Law to get through at all, which, coupling the answer with the schedule, he thought embraced the present case, then it appeared to him that he could not give effect to the doctrine of delay; but that the case, however, was one in which, considering the delay of which the company had been guilty in making that application (which delay, he found, much exceeded what in several instances this Court had deemed sufficient to disentitle the plaintiff to ask for an injunction), he did not think it expedient to give the costs of the motion, and that the appeal would therefore be dismissed, but without costs. And where the plaintiffs covenanted with the defendants (a railway company) to do certain works within a given time, to the satisfaction of the engineer of the company, and that if the works should not be so done the company might enter into possession of the plaintiffs' plant, and complete the works; and the company covenanted to pay for the works from time to time during their progress, according to the certificate of the engineer, and all disputes were to be referred to the latter; and the works were not completed within the period originally limited, and some time afterwards the company gave notice of their intention to enter under the agreement, and complete the works; and the

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Fraud (here)
ground of
relief on a
bill for an
account.

plaintiffs filed a bill stating that they had done all which they had contracted to do, except what the company had prevented them from doing, and that they had not been fully paid for the work done—alleging that the engineer fraudulently and collusively with the company certified a less amount than what was due to the plaintiffs, and praying for an injunction and an account; a demurrer for want of equity was overruled, on the ground that the plaintiffs would be entitled to some relief at the hearing, and that the species of fraud alleged in the bill gave jurisdiction to the Court, although the plaintiffs had not completed the whole of their work (1). The equitable jurisdiction in matters of account is concurrent with that of Courts of Law, and no precise rule can be laid down as to the cases in which it will be exercised; this Court reserving to itself a large discretion upon the subject, in the exercise of which it will pay due regard to the nature of the case, and the conduct of the parties, and will not restrain an action already commenced merely on the ground that from the number and complexity of the items in the account a judge at *nisi prius* would urge the parties to refer it; and an injunction in such a case was refused on the ground of delay, the bill not having been filed until six months after the action was commenced, and the injunction not moved for until another six months after answer, and when the cause was ready for hearing (2).

Action not
restrained
where the
bill does not
establish a
case for an
account.

2. In *Moses v. Lewis* (3) a demurrer was allowed to a bill for a general account, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action at law, because the bill did not establish a case of account on its own statement, and it was too late for the plaintiff to ask the interference of the Court, after having suffered the action to be tried at *nisi prius*.

3. In *Orease v. Penprase* (4), an action having been brought by a toller or agent of tin-mines against his principal, the lessee of the mines, upon a bill for an account, and an injunction to restrain

(1) *Waring v. Manchester, Sheffield, and Lincolnshire Railw. Co.*, 2 H. & Tw. 239.

(2) *South-Eastern Railw. Co. v. Martin*, 2 Ph. 758; 1 H. & Tw. 69.

(3) 12 Price, 502.

(4) 2 Y. & C. 527.

the action, filed by the defendant at Law; after an answer put in, admitting unadjusted accounts, the Court refused, on motion, to dissolve the injunction, as the question might be decided and the accounts taken in a Court of Equity.

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4. In *Glennie v. Imri* (1) it was held that a Court of Equity will not take an account of debts one way, and of damages the other, nor in any case where the subject as to which the account on one side is required would not be a matter of set-off at Law; though it does not follow that where there would be a set-off at Law there would necessarily be an account in Equity. Accordingly, where the plaintiff in the course of various dealings had given various bills of exchange in payment of goods supplied, and alleged by his bill that a large parcel of the goods furnished was, by the fraud of the defendant, very deficient in quantity and quality; the Court refused to grant him either an account or an injunction, inasmuch as his object was to reduce the amount of the bills of exchange by the damages which he claimed for the alleged breach of contract, and that as this was not the subject of set-off at Law it could not be the subject of account in Equity.

No account in Equity where debt one side, and damages other side, nor where there would be no set-off at Law of the subject of the account—yet though set-off at Law, still an account may be refused.

5. Where A., having dealings with B., C., and D., who traded under the firm of B. & Co., and having become indebted to them on several transactions, entered into a covenant with them for payment of the whole amount, and B. and D. afterwards died, and C. retired from the firm and assigned his interest in it to E., and the business of the firm was continued by E. and F. under the firm of B. & Co., and A. continued his dealings with that firm, and made various payments to them; upon a bill brought to restrain an action on the covenant brought by C. against A., the Court held, that although, on the ground of intricate transactions between A., C., and E., a bill for an account might lie by A. against the two latter, yet such a bill was not sustainable against the other partners also upon a mere general charge of mutual dealing, and no special connection appearing between their accounts and those of A., C., and E. (2).

6. After judgment and execution in ejectment for non-payment of rent, a bill does not lie at the suit of the tenant for an

(1) 3 Y. & C. 436; 3 Jur. 432.

(2) *Jones v. Maund*, 3 Y. & C. 347.

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account, and to be restored to the possession on payment of what shall appear due, without bringing the rent and costs into Court, if the question appears to be merely, whether so much rent was due, and not to be of too complicated a nature to be tried at Law; and the account sought in this case consisting only of three disputed items, admitted to have been paid, if at all, on account of rent, and being such as a jury might easily have investigated, the Court dismissed the bill with costs. It would have been otherwise, *semble*, if there had been a ground of defence which could not be set up in ejectment, but which it was unconscionable in landlord not to admit, or if an account had been so complex that it could not properly have been taken at Law (1).

7. Where a tenant having a claim against his landlord for unliquidated damages, occasioned by cutting timber on the demised premises, in pursuance of a power so to do reserved by the lease, and the landlord brought an ejectment for non-payment of rent; on a bill filed by the tenant stating his claim, and charging that if ascertained and credit given for it there would not be a year's rent in arrear, on that fact being established by an issue the tenant was restored to the possession (which the landlord had obtained in the meantime) on paying the balance due by him, and decreed entitled to an account of mesne profits, &c. (2).

As between landlord and tenant, if accounts too complicated, to be taken at Law—ejectment for non-payment of rent restrained and account taken.

8. Where there have been various dealings between landlord and tenant, so as to produce an account too complicated to be taken at law, and the landlord has brought an ejectment for non-payment of rent, the tenant may file a bill before judgment at Law for an account on the footing of those dealings, and to have the balance applied to the rent claimed to be due, and the tenant need not bring in the rent under 4 Geo. 1, c. 5 (3).

9. Where the plaintiff in a suit for an account had obtained, after answer, an injunction to restrain the defendant from suing him for a sum of £3000, which formed an item in such account, but such injunction was not granted till the day of trial, and the defendant obtained a verdict for the £3000; the Court, advertent to that circumstance, and also to others which came out in the

(1) *O'Mahony v. Dickson*, 2 Sch. & Lef. 400. (2) *Beasley v. D'Arcy*, 2 Sch. & Lef. 403, n.

(3) *O'Connor v. Spaight*, 1 Sch. & Lef. 305.

evidence of the cause, allowed the £3000 to stand as an item in the account (1).

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10. Where a decree giving relief to a party whose title was gone at Law directs the accounts on the rents reserved in *bonâ fide* leases of tenants not parties to the suit, the party relieved will be restrained from proceedings at Law to evict the tenants, they being tacitly protected by the decree; for a decree of this Court always guards against the rights of persons not parties to the suit, for it gives relief on the terms that third persons not parties to the suit shall not be prejudiced (2).

A decree of this Court does not prejudice rights of persons not parties to suit.

11. The bare relation of principal and agent is not sufficient to entitle the former to relief in Equity if the account can be fairly tried at Law (3). Where an action at law had been brought to recover the produce of some foreign specie remitted by a merchant abroad to an agent in London, and the agent filed his bill, alleging generally that there were mutual dealings and transactions between the parties, and praying that an account might be taken of them, and for an injunction, the Court allowed a demurrer (4). And where a trading firm agreed to give to an agent a commission on orders obtained by himself, and a commission at a different rate on orders not obtained by him, but given by persons first introduced by him; Lords Justices Knight Bruce and Turner held, reversing a decision of Vice-Chancellor Sir W. P. Wood, that the fact that the agent must in general be ignorant of the latter class of orders did not entitle him to file a bill against his principals for an account of what was due to him for commission, but that his remedy was at Law (5). But the first duty of an agent, receiver, trustee, or executor, is to be constantly ready with his accounts; and where owners of a privateer acting for themselves and the crew, in the sale of the prizes, had neglected to render accounts, and delayed the distribution of the proceeds; upon a bill by the crew for an account, and distribution of the prize-money, the owners were charged with interest on the balances, and costs (6).

Bare relation of principal and agent does not entitle principal to an account.

Mere mutual dealings between principal and agent do not entitle agent to an account.

Where agent neglects to render accounts, principal is entitled to an account.

(1) *Abbey v. Petch*, 1 Y. & C. Ch. 258.

(4) *Frietas v. Dos Santos*, 1 Y. & J. 574; see also 2 Y. & J. 33.

(2) *Shine v. Gough*, 1 Ball & B. 436.

(5) *Smith v. Leveaux*, 2 De G. J. &

(3) *King v. Rossett*, 2 Y. & J. 33. S. 1.

(6) *Pearse v. Green*, 1 Jac. & W. 135.

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Mere matter of set-off or other defence at Law disentitles to restrain proceedings there, and plaintiff (here) came too late, being after he had allowed the action to be determined at *nisi prius*.

After an account under a decree, no action can be allowed at Law to over-haul the account. Defendant should not appear, but apply for an attachment.

Court will endeavour to assume jurisdiction in matters of account, where it will promote substantial justice. Account (here) at suit of builder against employer.

12. In *Cooper v. Hatton* (1) the Court allowed a demurrer to a bill for a general account to be taken of all dealings and transactions between the parties, and for an injunction to restrain the defendant from taking out execution on a judgment recovered by him in an action, on the grounds that the statement in the bill did not furnish such a case of matter of account between the parties so as to entitle the plaintiff to the interference of the Court on principles of Equity, being nothing more than matter of set-off, or other defence at Law; and if it had been a stronger case, the plaintiff, after having suffered the action at law to be tried and determined at *nisi prius*, had come too late to ask for the interference of the Court (2).

13. After an account taken under a decree a party shall not be allowed to overhaul the account by bringing an action at Law on the same subject-matter. In such a case the defendant at Law ought not to appear in the action, but ought to apply to this Court for an attachment; but having suffered the action to proceed, and then filed this bill, the defendant at Law was held liable to the costs of the action, and the proceedings in this cause were stayed, with liberty for all parties to apply in the original cause (3).

14. The Court will endeavour to assume jurisdiction in matters of account where doing so will promote substantial justice between the parties. And where, on contracts made by a builder to execute works, three actions had been commenced by the builder against his employer for the payment of moneys alleged to be due under the contracts, and these actions had been consolidated at the instance of the employer, who then commenced two actions against the builder for breaches of contract, and the builder alleged that he was unable to prosecute the actions commenced by him, because the inspecting architect had been prevented by the act of the employer from giving a conclusive certificate as to the work done; upon a bill by the builder for an injunction to restrain the actions, and for an account of what was due, and for payment, Vice-Chancellor Sir J. Stuart held, that the case was one in which the Court would exercise its jurisdiction in matters of account, and accounts and inquiries were ordered accordingly, whether anything, and

(1) 12 Pri. 502.

(2) *Ib.*

(3) *Bell v. O'Reilly*, 2 Sch. & Lef. 430.

what, was due to the plaintiff in respect of works executed and materials supplied, having regard to the circumstances under which the works were carried on; and whether anything, and what, was due to the defendant from the plaintiff in respect of breaches of contract, without prejudice to any question of waiver, and further consideration and costs were reserved (1).

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15. Where it is unquestionable that a Court of Law can do as full justice to the subject in dispute as can be done in Equity, this Court will not interfere to stay the proceedings at Law (2). But if there be any doubt about that, the plaintiff has a right to maintain his suit in this Court, in this case for an account, &c.; and when the completeness of the relief at Law is doubtful, and questions of account, of the right to raise a case of wilful default, and of fiduciary relationship between the parties, are involved, the Court will entertain a suit for the purpose of transferring the proceedings from Law to Equity, and will grant an injunction until the hearing upon the terms (here) of giving judgment in the said action to be dealt with as the Court should direct (3).

Where it is unquestionable that a Court of Law can do as full justice in the case as a Court of Equity, Equity will not interfere to stay proceedings at Law. But if there be any doubt about that, plaintiff can maintain his suit.

16. On a bill to enjoin a judgment, with a prayer for an account, where the defendant goes into the account, it is too late after the testimony is closed for the complainant to object that the Court has not jurisdiction of the subject-matter of the account (4).

SECT. 8. *Set-off.*

1. The mere existence of cross-demands is not sufficient, and still less will the Court interfere, on the ground of equitable set-off, to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him and the party against

The mere existence of cross-demands does not entitle a party to prevent the recovery of a sum awarded as damages.

(1) *Dabbs v. Nugent*, 11 Jur. (N. S.) 943; 14 W. R. 94; 13 L. T. (N. S.) 396.

(2) *Southampton Dock Company v. Southampton Harbour and Pier Board*, L. R. 11 Eq. 254, 260; *Fluker v. Taylor*, 3 Drew. 183; *South-Eastern Railw. Co.*

v. Brogden, 3 Mac. & G. 8.

(3) *Southampton Dock Company v. Southampton Harbour and Pier Board*, L. R. 11 Eq. 254.

(4) *Head v. Gervais*, Walker, 431 (Amr.)

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Equitable set-off exists where there are equitable grounds for protection against adversary's demand — mere cross-demands are not enough.

whom the action is brought, although the subject-matter of the account consists of dealings and transactions arising out of the contract, the breach of which is the subject of the action (1). Lord Chancellor Cottenham, upon discharging an order made in this case by Vice-Chancellor Sir L. Shadwell for an injunction to stay execution in an action, said: "It was said the subjects of the suit in this Court, and of the action at law, arise out of the same contract; but the one is for an account of transactions under the contract, and the other for damages for the breach of it. The object and subject-matters are, therefore, totally distinct, and the fact that the agreement was the origin of both does not form any bond of union for the purpose of supporting an injunction. The question then comes to this: Is the defendant, in a suit in this Court for an account, the balance of which I will suppose to be uncertain, to be restrained from taking out execution in an action for damages against the other party to the account until after the account shall have been taken, and it shall thereby have been ascertained that he does not owe to the defendant at Law, upon the balance of the account, a sum equal to the amount of the damages? If so, it cannot be upon the ground of set-off, because there is not at present any balance against which the damages can be set off; nor can it be because the damages are involved in the account, for certainly they can form no part of it. We speak familiarly of equitable set-off, as distinguished from the set-off at Law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient: *Whyte v. O'Brien* (2); although it is difficult to find any other ground for the order in *Williams v. Davies* (3) as reported. In the present case there are not even cross-demands, as it cannot be assumed that the balance of the account will be found to be in favour of the defendants at Law. Is there, then, any equity in preventing a party who has recovered damages at Law from receiving them, because he may be found to be indebted, upon the balance of an unsettled account, to the party against whom the damages have been recovered? Suppose the

(1) *Rawson v. Samuel*, Cr. & Ph. 161, 178.

(2) 1 S. & S. 551.

(3) 2 Sim. 461.

balance should be found to be due to the plaintiff at Law, what compensation can be made to him for the injury he must have sustained by the delay? The jury assess the damages as the compensation due at the time of their verdict. Their verdict may be no compensation for the additional injury which the delay in payment may occasion. What equity have the plaintiffs in the suit for an account to be protected against the damages awarded against them? If they have no such equity, there can be no good ground for the injunction. Several cases were cited in support of the injunction, but in every one of them, except *Williams v. Davies* (*supra*), it will be found that the equity of the bill impeached the title to the legal demand. In *Beasley v. D'Arcy* (1) the tenant was entitled to redeem his lease upon payment of the rent due; and in ascertaining the amount of such rent, a sum was deducted which was due to the tenant from the landlord for damage done in cutting timber. Both were ascertained sums, and the equity against the landlord was that he ought not to recover possession of the farm for non-payment of rent whilst he owed to the tenant a sum or damage to that same farm. In *O'Connor v. Spaight* (2) the rent paid formed part of a complicated account, and it was impossible, without taking the account, to ascertain what sum the tenant was to pay to redeem his lease. In *Ex parte Stephens* (3) the term equitable set-off is used; but the note having been given under misrepresentation, and a concealment of the fact that the party to whom it was given was at the time largely indebted to the party who gave it, the note was ordered to be delivered up as paid. In *Higgott v. Williams* (4) the complaint against the solicitor for negligence went directly to impeach the demand he was attempting to enforce. In *Lord Cawdor v. Lewis* (5) the proposition is too largely stated in the marginal note, for in the case the action for mesne profits was brought against the plaintiff, who was held, as against the defendant, to be in equity entitled to the land. None of these cases furnish any grounds for the injunction in the case before me. In *Preston v. Strutton* (6) the pendency of an unsettled partnership account upon which the balance was in dispute was held to be no

(1) 2 Sch. & Lef. 403, n.

(2) 1 Sch. & Lef. 305.

(3) 11 Ves. 24.

(4) 6 Mad. 95.

(5) 1 Y. & C. 427.

(6) 1 Anstr. 50.

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Equitable
set-off exists
where there is
a right of set-
off in Equity
which would
not be avail-
able in a
defence at
Law.

The right in
Equity to set-
off must be
prayed.

No set-off
where debts
are due in
different
rights.

ground for an injunction to restrain execution upon a judgment which had been obtained upon a note given for a balance upon a former settlement." But where certain consignments of oil were made from Colombo to certain persons in England, and during the voyage several of the casks leaked, and some of the oil escaped and was lost, but the greater part was collected, and sold in one mass by the captain in the course of the voyage, for £750; the Court held, first, that a bill in Equity was sustainable by the consignees against the shipowner for an account of the oil lost and the oil sold; secondly, that in an action brought by the shipowner against an individual consignee for freight and average, the latter could not set off his share (as ascertained by the agreement) of the moneys arising from the oil sold; consequently that he could maintain a bill in Equity to establish a right of equitable set-off (1). But in *Wattleworth v. Pitcher* (2) it was held that it was sufficient for the purpose of obtaining an injunction to restrain proceedings at Law that the bill and affidavit stated that an unsettled account subsisted; and that on such account the plaintiff at Law would be found indebted to the plaintiff in Equity, and though the bill shewed it might be set off at Law.

2. Where cross-demands exist between two parties, one of whom is proceeding by an action at Law, and the other by a suit in Equity for an account and payment; the Court of Equity, although it may be of opinion that the facts of the case entitle the plaintiff in Equity to have one demand set off against the other, will not give that relief, unless it has been distinctly prayed by the bill (3).

3. Where B. (the plaintiff) was residuary legatee and surviving executrix of her husband, to whom C. and one O. had given a joint bond, and C. died, and the plaintiff was indebted on her own private account to O., who became bankrupt; upon a bill against his assignees for an injunction, and to set off what was due to her as executrix against the debt due from herself to the bankrupt, Lord Chancellor Hardwicke refused an injunction, saying that it was admitted such a set-off could not be made at Law, and that he did not know of any like instance of its being allowed in Equity, and that the debts were due in different rights; and that the 2 Geo. 2.

(1) *Jones v. Moore*, 4 Y. & C. 351.

(2) 2 Price, 46.

(3) *Rawson v. Samuel*, Cr. & Ph. 161.

c. 22, s. 13 (enacting that the mutual debts there mentioned might be set off against one another) did not comprehend it (1).

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4. Where H., who had an account with bankers, drew bills, which were accepted by his customers, and discounted by his bankers, and before the bills were at maturity the bankers, on the ground of H.'s liabilities on the bills, and of some of the acceptors having stopped payment, refused to honour H.'s cheques, and H. brought an action for the balance in his banker's hands, and for damages for having dishonoured his cheques; and before the trial several of the bills discounted by the plaintiffs for H. (the defendant) had been dishonoured in consequence of the suspension of payment of the parties to them, and the plaintiffs alleged that the amount of the bills dishonoured exceeded the amount of the defendant's balance; the bankers filed a bill, and obtained an injunction to restrain all further proceedings in the action (2). The Vice-Chancellor (Sir J. Stuart) said: "I do not think I can refuse this motion. The plaintiffs in Equity state that an action has been brought against them by one of their customers for the recovery of a balance standing to his credit at their bank upon a banking account; but that, notwithstanding such balance, there is on the part of the defendant a much larger liability to them, and they insist that they ought to be allowed to hold such balance until the defendant has discharged that liability. That is a fair question for this Court to determine. What the defendant in Equity says is, that he has a right to go on with his action, and have the question tried at Law. The plaintiffs, by their bill, impeach altogether the title to the legal demand of the defendant to the balance, and state the nature of his liabilities to them, which they allege have not been discharged. In that state of things the Court is, I think, bound to grant the injunction which has been asked. *Rawson v. Samuel* (3) has been much relied upon for the defendant, but it is contrary to the present case. There the legal right of the defendant in Equity was not impeached by the bill, and it was left to be settled at Law. Here the legal right of the defendant in Equity is impeached in

(1) *Bishop v. Church*, 3 Atk. 691; (2) *Agra and Masterman's Bank v. 8 Geo. 2, c. 24, ss. 4, 5, and Chitty's (Limited) v. Hoffman*, 11 Jur. (N. S.) 335; 34 L. J. (Ch.) 285.

(3) Cr. & Ph. 161.

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If plaintiff impeaches defendant's liability in Equity, the Court will determine the question of set-off, and restrain action at Law.

Upon action against guarantor, equitable plea of set-off of a claim against principal debtor allowed.

Judgment not enjoined unless the set-off could be sued upon by plaintiff at Law or in Equity.

Defendant in an action neglecting to plead a set-off, cannot be relieved in Equity without shewing sufficient excuse for neglect.

Equity. Lord Cottenham, in *Rawson v. Samuel*, said: 'In the present case, there are not even cross-demands, as it cannot be assumed that the balance of the accounts will be found to be in favour of the defendants at Law.' Can I assume here that if the action were to be tried it would be held that a banker was not justified in retaining a customer's balance until a liability to him, on the part of the customer, was discharged?" And further on, the Vice-Chancellor said: "This bill impeaches the title of the defendant in Equity to recover the balance, and in that state of things the Court is, I think, bound to restrain the action" (1).

5. Where an award was pleaded by which it was found that the plaintiffs should pay to H. a certain sum; that the bills sued on in the action were made by the plaintiffs, and accepted by H., for and on account of the purchase-money of an estate, and that H. claimed to set off the sum awarded against an equal part of the purchase-money; it was held, in an action against the defendant, surety for H., that the plea constituted a good equitable defence, so far as the sum to which it applied. For on the state of the pleadings it must be taken that at the time of the award the sum secured by the bills was all that remained due of the purchase-money; and this being so, the Defendant might in Equity, without bringing H., the principal debtor, before the Court, claim the benefit of the amount of compensation awarded as a deduction from that sum (2).

6. A party going into Equity to enjoin a judgment on the ground of set-off must shew as strong a claim to be paid the set-off as if he were suing on it at Law or in Equity (3).

7. A defendant in an action at Law having a set-off available either at Law or in Equity, but neglecting to plead it, cannot afterwards make it a ground of relief in Equity from the judgment against him in such action, without shewing sufficient excuse for his neglect. That he was advised the Law Court had no jurisdiction over the set-off is no such excuse (4). And where, at Law, the

- (1) *Agra and Masterman's Bank (Limited) v. Hoffman*, 11 Jur. (N.S.) 335; 34 L. J. (Ch.) 285. (N. S.) 461; 17 W. R. 592.
(2) *Murphy v. Glass*, L. R. 2 P. C. 408; 6 Moo. P. C. (N. S.) 1; 20 L. T. (3) *Walker v. Ayres*, 1 Clark, 443 (Amr.).
(4) *Pearce v. Winter, &c.* 32 Ala. 107 (Amr.).

defendant was prevented by unavoidable accident from setting up an independent set-off liable to be enforced at Law, it was held that he could not enjoin the judgment and set up his set-off against it, but must pursue his remedy at Law. And if his set-off is only recoverable in Equity, he cannot enjoin the judgment and avail himself of his claims against it (1).

SECT. 9. *Restraint of Trade.*

1. Where A., a trader, having become bankrupt, and his assignees being about to sell his stock-in-trade, at the request of A. and of A.'s son, C., sold the same to B., and B. and C. agreed to carry on business in partnership, and to employ A. in the management of the business, in consideration of A.'s executing a bond not to carry on the same kind of business within a prescribed limit (twenty miles from the place of business); and the agreement was duly carried out, the bond was given, and an undertaking to employ A. as manager, though not for any definite time, was signed by B. and C., and handed to him, and he was taken into employment accordingly; the Master of the Rolls, Sir J. Romilly, held, that there was a good consideration for the bond, and, notwithstanding the absence of complete mutuality, A. was restrained from carrying on business contrary to the terms of the bond (2). And where A. had purchased from B. certain premises, fixtures, and the goodwill of a business, and as part of the consideration for the purchase of the goodwill, B. covenanted not to carry on business at a particular place, and A. covenanted to employ B.; and B., having been dismissed, set up business in breach of his covenant; the Master of the Rolls, upon a bill for specific performance of the covenant, held, that although there was not sufficient evidence to shew that B. had been properly dismissed, yet that A. was entitled to an injunction to restrain B. from committing a breach of his negative covenant, but the Court not being satisfied as to the *bona fides* of the dismissal, and the evidence of

(1) *Hudson v. Kline*, 9 Gratt. 379
Amr.)

(2) *Clarkson v. Edge*, 33 Beav. 227;
10 Jur. (N. S.) 871; 33 L. J. (Ch.) 443.

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Acting as
journeyman
within a
quarter of a
mile re-
strained
(here).

Managing
clerk of
solicitor, re-
strained (here)
practising
within fifty
miles.

Articled
clerk after
admission,
restrained
(here) acting
for any of his
late master's
clients.

the alleged neglect of B., gave no costs of the suit (1). And where D. had sold his business, goodwill, fixtures, &c., to N., and had covenanted not to carry on, or be concerned or interested in, the business of a tailor within five miles of the former shop; and D. then engaged himself to his nephew (whose name was the same as his own), carrying on the same trade within a quarter of a mile of the former place of business, as a journeyman, at a weekly salary; Vice-Chancellor Sir R. Malins held, that this was within the spirit and letter of the covenant, and granted an injunction (2).

2. Where the Court is of opinion that a bond is not intended to be satisfied by the payment of the sum named in the bond, it will interfere by injunction to restrain the breach; and on breach of the condition of a bond which contained a recital that the defendant had agreed to become the managing clerk of the plaintiff, a solicitor at W., and that it was thereupon agreed that the defendant should enter into a bond not to practise as a solicitor at or within fifty miles of W., and that if he did so, then, if he should pay to the plaintiff £1000 as liquidated damages, the bond should be void; Vice-Chancellor Sir W. P. Wood held, that the solicitor was entitled to an injunction restraining the clerk from practising within the specified distance (3). And where A., on being articled to B., had covenanted not to be concerned for any of B.'s clients, and to forfeit £100 for any such breach; and A., after being admitted, acted in contravention of this covenant, he was restrained by injunction from so doing (4).

3. Where the defendant, on becoming the servant of the plaintiff a coachbuilder, executed a bond for the payment of £500 to the plaintiff if he should, on leaving the plaintiff's service, be engaged in a similar business within a circle of forty miles in diameter, and five months after the defendant left the plaintiff's service; and W., a coachbuilder within the prescribed distance, wrote to the plaintiff for the defendant's character, and the plaintiff, in reply, only said, "The defendant will be of no use to you as foreman," and W. engaged the defendant; and the plaintiff, after some delay.

(1) *Daggett v. Ryman*, 17 L. T. (N. S.) 486; 16 W. R. 302.

(2) *Newling v. Dobell*, 19 L. T. (N. S.) 408; 38 L. J. (Ch.) 111.

(3) *Howard v. Woodward*, 10 J. (N. S.) 112; 34 L. J. (Ch.) 47.

(4) *Nicholls v. Stretton*, 7 Beav. 4; and see S. C. 10 Q. B. 346.

commenced an action against the defendant on the bond, but subsequently abandoned it, and (the defendant having continued in the service of W., to the knowledge of the plaintiff, for upwards of nine months) the plaintiff filed a bill for an injunction; the Master of the Rolls, Sir J. Romilly, held, that the plaintiff was not entitled to relief. The Master of the Rolls said it was impossible to give the plaintiff the decree he asked, after writing such a letter. What he said in that letter was either true or not true. If it was true, and if he really thought that the defendant would be of no use as a foreman, why did he commence this suit? It was a mere wanton act, as he himself could not be injured. But if it was untrue, if he really thought it would be a loss to himself and a gain to W. if the defendant obtained the situation he was seeking, it was not a proper act by a master towards his servant. The plaintiff ought then to have told W. that the defendant, though a good workman, was bound not to enter into his service. The effect of this would have been to raise the defendant's character as a workman, though he would have been prevented from working within twenty miles of Biggleswade (the centre of the diameter) (1). And in granting an injunction the Court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit, and third parties. And as W. was not a party to the suit, the Court also, on that ground, dismissed the bill, but as the defendant had improperly disputed the question of distance, without costs (2).

4. Where the defendant had agreed to act as servant to the plaintiff and no other person for seven years, with power to either party to determine the agreement on payment of £500, and subsequently the defendant engaged himself to another master without paying the £500; upon a bill by the master, Vice-Chancellor Sir W. P. Wood, on motion, made an order for an injunction, saying that this was not an agreement for payment of a sum by way of liquidated damages on breach of a covenant, but for the determination of the agreement itself on the performance of two conditions, and that the payment of £500 was evidently intended to prevent, in some degree, what had actually happened, the

(1) *Maythorn v. Palmer*, 13 W. R. 37; 11 Jur. (N.S.) 230; 11 L. T. (N.S.) 261.

(2) *Ib.*

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Covenant not to carry on same business within 200 miles not unreasonable, as in restraint of trade, if from character of the business such limit is necessary to protect purchaser.

services of the defendant being transferred to a rival house; but the Lords Justices, on appeal, ordered that if the defendant would bring into Court £600, to be dealt with as the Court should direct, the injunction should be dissolved; if not, the Court would take time to consider what could be done (1).

5. A covenant by a vendor of a business not to carry on the same business within 200 miles of a certain place, is not unreasonable, as in restraint of trade, if by reason of the character of the business such a limit of exclusion is necessary for the protection of the purchaser. And where, upon a sale by the defendant to the plaintiffs of a business of a horsehair manufacturer, the defendant agreed not to buy, sell, manufacture, or directly or indirectly interfere in the trade or business of a horsehair manufacturer, except for the benefit of the plaintiffs; and subsequently, in a deed of assignment (executed in pursuance of the previous contract), the defendant covenanted that he would not, directly or indirectly carry on the business of a horsehair manufacturer within 200 miles from B., without the consent in writing of the plaintiffs, except for their benefit and at their request; and the defendant, besides being a manufacturer of horsehair, was, at the time of the sale, a general dealer in unmanufactured horsehair, and also purchased and sold manufactured horsehair, which was usual both with dealers and manufacturers; the Master of the Rolls, Sir J. Romilly, held, upon evidence as to the mode of carrying on the business, that the limit of 200 miles was reasonable; also that the defendant had sold so much of the business as belonged to that of a horsehair manufacturer, though forming part also of the business of a horsehair dealer, and that he must be restrained from the purchase and sale of manufactured horsehair (2).

6. Where A. undertook to manage the business of B., a chemist, and agreed that he (A.) would not carry on the business of a chemist either in his own name or for his own benefit, or in the name or names, or for the benefit, of any other person, within seven miles of the place, under a penalty of £500, to be secured by bond, which was duly executed, and he afterwards solicited orders for another chemist within the seven miles; the Lords

(1) *Thornton v. Kendall*, 11 W. R. 352.

(2) *Harms v. Parsons*, 32 Beav. 322; 9 Jur. (N. S.) 145; 32 L. J. (Ch.) 247.

Justices, upon an appeal from an order of Vice-Chancellor Sir J. Stuart, restraining the defendant from carrying on business within a certain limit, held, that it was exceedingly doubtful whether there was any contract binding the defendant not to do what he had done, and that at this stage no injunction could be granted, and discharged the Vice-Chancellor's order without prejudice to any question in the cause (1).

7. A covenant not to be engaged in a specific trade, "or in any matter or thing whatsoever in anywise relating thereto," within a given district, does not prevent the covenantor from lending money to a person engaged in such trade within the limits, upon mortgage of his trade premises, although he may know that the mortgagor has no means of paying the debt except out of the profits of the business (2); but a mortgagor expressly charging the debt upon profits would be a breach of the covenant (3). *Seem*, also, there is nothing in such a covenant to prevent the covenantor from buying any number of houses within the district, fitting them up, and selling them for the purpose of the trade in question, provided he has no direct interest in the businesses carried on in them after such sales respectively (4).

A covenant not to be engaged in a trade, or in any matter, &c. relating thereto, within given district, does not prevent lending money upon mortgage of premises used for such a trade. But an express charge of the debt upon profits of such business would be a breach of the covenant.

8. Where the defendant had agreed to act as assistant to the plaintiff in his business of surgeon and apothecary, and by deed had covenanted with him that he would not during the time the plaintiff should carry on his profession, at any time after he should cease to act as the plaintiff's assistant, and whether the deed should be in other respects determined or not, carry on or exercise the profession and business of a surgeon and apothecary in the town of C., or within the compass of five miles therefrom; and the deed contained a proviso that it should be lawful for the defendant, by giving one month's notice, to determine the deed and the covenants and agreements therein contained, subject nevertheless and without prejudice to any rights of action which might have accrued, or which might accrue thereafter, to the plaintiff by virtue of the deed, and for the true performance of the covenants thereinbefore contained, on the part of the defendant not to carry

(1) *Clark v. Watkins*, 9 Jur. (N. S.) 142; 11 W. R. 319. (2) *Bird v. Lake*, *Bird v. Turner*, 1 H. & M. 338.

(3) *Ib.*

(4) *Ib.*

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on the profession or business of a surgeon and apothecary at C.; and the defendant by due notice determined the deed, "and the covenants and agreements therein contained," and then proceeded to practise as a surgeon and apothecary at C.; Vice-Chancellor Sir J. Stuart granted an injunction to restrain him in the terms of the covenant (1).

Upon a contract not to carry on business within a given distance, the distance is to be measured in a straight line upon a horizontal plane.

The mere sale of the goodwill does not imply a contract not to set up again in similar business, nor a restriction as to the place of carrying on that business.

The sale to the other partners of share in business and goodwill, disentitles vendor setting up same business at same place with others, and representing his as the old firm.

9. Under a contract not to carry on business within a given distance, upon a motion to commit for breach of an injunction restraining the carrying-on of the business within the distance, Vice-Chancellor Sir W. P. Wood held, that the distance is to be measured as the crow flies, that is, in a straight line upon a horizontal plane, and not by the nearest practicable mode of access or route (2).

10. *Primâ facie*, the sale by one partner of his share in a going business to the other partners imports a sale of the vendor's interest in the goodwill of that business (3). But it is perfectly settled that the mere sale of the goodwill neither implies a contract on the part of the vendor not to set up again in a similar business, nor restricts him as to the place of carrying on that business (4). And upon a sale, goodwill means every positive advantage—as contrasted with the negative advantage of the vendor not carrying on the business himself—that has been acquired by the vendors' firm in carrying on its business, whether connected with the premises or the name of the firm, or with any other matter carrying with it the benefit of the business; but it does not follow that the purchaser has a right to use the name of the vendors *simpliciter* (5). But where A., B., and C. carried on the business of stuff-merchants at X., under the firm of A. & Co.; and A. sold to B. and C. his share in the business and the goodwill, and B. and C. (with A.'s consent) announced themselves to the world as B. & Co., late A. & Co.; but some time afterwards A. resumed the business of a stuff-merchant at X., with other persons, under the name of A. & Co., and under circumstances shewing it to be his intention to represent to the public that his was the old firm; the Court granted an interim injunction, restraining A. from carrying on the business of a stuff-

(1) *Giles v. Hart*, 5 Jur. (N. S.) 1881; 1 L. T. (N. S.) 154. (3) *Churton v. Douglas*, 5 Jur. (N. S.) 887; Joh. 174.

(2) *Duignan v. Walker*, Joh. 446; (4) *Ib.*
28 L. J. (Ch.) 867. (5) *Ib.*

merchant at or in the immediate neighbourhood of X., under the firm of A. & Co., or from otherwise holding himself out as the successor of the old firm (1). And in *Crutwell v. Lye* (2) it was held that the sale of a trade with the goodwill does not, without an express covenant, prevent the vendor setting up again in a similar trade, or, without fraud, by representing it as a continuation of the old trade, or by conduct encouraging others to involve themselves, in the confidence that he would not trade again, &c. And upon a sale under a commission of bankruptcy of the waggon trade from Bristol and Bath to London, with the goodwill; another concern, from Bristol and Bath to W. and S., being purchased in trust for the bankrupt, and he having obtained his certificate, commenced trade again to London by that road, soliciting customers by advertisement and cards, stating generally, that being reinstated by his friends in the carrying business, his waggons set out at the usual hour, &c.; Lord Chancellor Eldon refused an injunction.

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But sale of a trade with goodwill does not prevent vendor setting up in similar trade, without fraud, by representing it as a continuation of old trade, or without fraudulently holding out an intention not to trade again.

11. Where the servant of a milkman in a street in London had agreed not to carry on the like business within three miles therefrom for twenty-four calendar months after quitting or being discharged the service, the Master of the Rolls, Sir J. Romilly, held, that this was not an undue restraint of trade, and the servant was restrained by injunction from violating his agreement—the injunction to be continued for two years from the date of a notice to quit given by the defendant to the plaintiff (3). In this case a milkman, carrying on business in three places, took the defendant into his service, and the defendant agreed, as regarded the milkman, his assignees, and successors, not to carry on a similar trade within certain limits, and the milkman sold his branch business at one of the three places to the plaintiff, who retained the defendant in his service; the Master of the Rolls held, that the plaintiff, as assignee and successor of part of the business, was entitled to the benefit of the defendant's contract; and the Master of the Rolls said that it would be a virtual breach of the injunction if the defendant assisted any other milkman (4).

Servant of milkman restrained carrying on like business within three miles.

And the contract may be made to include assignees and successors of the business.

12. Although in *Shackle v. Baker* (5) Lord Chancellor Eldon

(1) *Churton v. Douglas*, 5 Jur. (N.S.) 887; Joh. 174.

(3) *Benwell v. Inns*, 24 Beav. 307; 26 L. J. (Ch.) 663.

(2) 17 Ves. 335.

(4) *Ib.*

(5) 14 Ves. 468.

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said that the remedy for a breach of an undertaking given upon the sale of the goodwill of a trade, not to carry on the same business, and to use the best endeavour to assist the purchaser, &c., was an action or issue *quantum damnificatus*, and refused an injunction against proceeding at Law under a judgment for the consideration, upon affidavits before answer, still the cases shew that the Court will grant such an injunction.

13. Where A., in consideration of B. engaging him as his assistant in the business of an apothecary, at a stated salary, agreed in writing with B. not to practise as an apothecary within seven miles of the town of M., under a penalty of £500; and A., having been discharged by B. from his service, proceeded to practise as an apothecary in the town of M.; whereupon B. moved for an injunction to restrain A. from so practising, and the motion was ordered by the Court to stand over, with liberty for B. to bring an action; and in the action B. recovered £500 damages and the costs against A., and entered up judgment for the same; the Court of Common Pleas, being of opinion that the agreement was good at Law, and that the £500 was not to be taken as a penalty entitling the plaintiff to recover only the actual damage sustained by him, but as a fixed sum in the nature of liquidated damages which the defendant was to pay for the non-performance of his part of the contract; and B. afterwards proved under a fiat in bankruptcy issued against A., for the amount of the costs, but not for the damages, Lord Chancellor Cottenham held, that an injunction granted against A. on a renewed motion could not be maintained; the Lord Chancellor said that since the damages at Law had been obtained, the Court had to consider whether it would interfere to aid a contract which, in fact, no longer existed, that the party then applying could not shew that he had any legal right remaining, and the Court could not therefore interfere; and that if the Court did interfere it would be telling a party that though he had purchased the right to do the act he should not have the benefit of his purchase (1). But where a surgeon at W., upon taking an assistant, required him to give his bond in a penalty not to practise at W., and afterwards he discharged the

(1) *Sainter v. Ferguson*, 1 H. & T. reversing S. C. 13 Jur. 833; and see 383; 1 Mac. & G. 286; 14 Jur. 255, S. C. at Law, 18 L. J. (N.S.) C. P. 217.

assistant, who thereupon commenced practice at W., and the surgeon filed a bill to restrain him (the bill offered to waive the penalties of the bond), to which the defendant demurred; the Master of the Rolls, Sir J. Romilly, overruled the demurrer, holding that notwithstanding the pecuniary penalty the plaintiff was entitled to a remedy in Equity. The Master of the Rolls said that he took the principle to be this:—that where a person enters into an agreement not to do a particular act, and gives his bond to another to secure it, the latter has a right at Law and in Equity, and can obtain relief in either Court, but not in both; and that if he proceeds at Law on the bond, and recovers damages, and afterwards comes into Equity, and states that fact in his bill, a demurrer will lie, because he has chosen the jurisdiction and the remedy he will have, and that, accordingly, the practice had been to adopt the rule very strictly in Equity; and that it sometimes happened that this legal right was in doubt, and in such cases the Court used formerly to direct an action to try the right, and that this was now prevented by Rolt's Act, which compelled the Court to determine the legal right; but that the practice under the old system was a good illustration, and that when the Court gave liberty to the plaintiff to try his right in an action, if he succeeded, and only took nominal damages, he obtained his equitable relief; but if he sought and obtained substantial damages, the Court, when he came back, dismissed his bill, saying, "You have already had your remedy at Law;" but that the plaintiff had a right to say, "I will not have money, or take compensation in damages, but I will have the strict performance of that which is secured to me by the bond," which, in this case, was in the nature of a covenant by the defendant that he would not practise at W.; and that the bill contained a paragraph waiving the penalties of the bond, but that, without that, if after an injunction had been granted against the defendant, the plaintiff should bring an action for damages, the defendant might come here and have the injunction dissolved; and that the defendant had for valuable consideration entered into an engagement not to practise at W., which he was bound to perform, and that if the facts alleged were true the plaintiff was entitled to relief in this Court (1).

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Where a person agrees not to do a particular act, and gives a bond to another to secure it, the latter has a right at Law and in Equity, and can obtain relief in either, but not in both, and may select his forum.

(1) *For v. Scard*, 33 Beav. 327.

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Solicitor
restrained
practising in
Great Britain
for twenty
years.

A covenant
not to be con-
cerned for
plaintiff's
clients after
admission
as attorney.

The running
of a coach
contrary to an
undertaking
restrained.

On parol
evidence of
understand-
ing, a retiring
partner being
awarded a sum

14. In *Whittaker v. Howe* (1) the Master of the Rolls, Lord Langdale, granted an injunction to restrain a solicitor who had sold his business for a valuable consideration, on the terms of not practising in any part of Great Britain for twenty years, from so doing, and from endeavouring to induce any persons who were clients of the former and present firm to cease to employ the latter as their attorneys or solicitors; and an injunction was also granted to restrain the seller from detaining or destroying certain papers and documents belonging to the firm which he had got in his possession; and Lord Langdale (after referring to the cases on the law as to what was a reasonable restraint of trade) said that, having regard to the nature of the profession, to the limitation of time, and to the decision that 150 miles did not describe an unreasonable boundary, he must say, as Lord Kenyon said in *Davis v. Mason* (2), "I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line." And where the defendant had been taken as an articled clerk without premium, and had covenanted not to be concerned for any of the plaintiff's clients during the term of five years' articles, nor at any time after the term, and to forfeit £100 for every breach; and the defendant, after being admitted as attorney, acted in contravention of the covenant, the Master of the Rolls, Lord Langdale, held that this was a contract which the Court would enforce by injunction (3).

15. Where a coachmaker had sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from R. to London, or prejudicial to the business which he had sold, the Court granted an injunction restraining him from running a coach from P. through R. to London (4).

16. Where £500 had been awarded to B., a retiring partner, for the goodwill, &c., on an understanding, not expressed in the award, that he should not set up the same trade in the vicinity; on parol evidence of understanding, a retiring partner being awarded a sum for goodwill, &c., restrained setting up same trade in vicinity.

(1) 3 Beav. 383. But *v. Ward v. Byrne*, 5 M. & W. 548; *Nicholls v. Stretton*, 10 Q. B. 346; and *Mumford v. Gething*, 7 C. B. (N.S.) 305.

(2) 15 T. R. 118.

(3) *Nicholls v. Stretton*, 7 Beav. 42; and see S. C. 10 Q. B. Rep. 346.

(4) *Williams v. Williams*, 2 Sw. 253; 1 Wils. 473.

parol evidence, the Court granted an injunction to enforce the award, and such understanding (1).

17. Where articles under which A. had served his clerkship to an attorney contained a proviso that A. should not practise within a certain district; and also a covenant on the part of his father that A. should, within a month after he came of age, execute a bond in a specified penalty to secure his fulfilment of the proviso; and A., who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bond, and, with a knowledge of the purport of the articles, completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him; Lord Chancellor Cottenham, affirming a decision of the Vice-Chancellor, refused a motion for an injunction to restrain him from practising within the district, with costs, being of opinion that the injunction could not be granted (2).

18. A contract with the proprietors of a theatre not to write dramatic pieces for any other is a legal contract, as a similar restraint of a performer would be, and does not resemble a covenant restraining trade generally (3); and a covenant restraining trade within particular limits, or partners from carrying on the same trade for their private benefits, is legal (4).

A contract with proprietors of a theatre not to write dramatic pieces for any other is legal, and so a similar restraint of a performer is legal. A covenant restraining partners carrying on same trade for their private benefit is legal.

19. Where, on a sale by a wine-merchant of his stock-in-trade and business, he had covenanted that he would not set up or carry on at C., or in any other place within the counties of C., A., or M., the business of a wine and spirit merchant, and the vendor gave up his place of business at C., and had no place of business within the prescribed district, but he solicited and obtained orders within it; it was held by Lord Cranworth, confirming the decision of Vice-Chancellor Sir R. T. Kindersley, that the question whether this was a breach of the covenant was too doubtful to entitle the plaintiff to an injunction without bringing an action; but it was held

(1) *Harrison v. Gardner*, 2 Madd. 198.

(2) *Capes v. Hutton*, 2 Russ. 357.

(3) *Morris v. Colman*, 18 Ves. 437; Raym. 1456.

(4) *Ib.*

and as to the validity of contracts restraining trade, *v. Chesman v. Nainby*, 1 Bro. P. C. 234; 2 Str. 739; 2 Ld.

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There is no irrebuttable presumption against the legality of a covenant in general restraint of trade.

Public policy allows, upon the sale of anything obtained by the skill of the vendor, any stipulation, however restrictive, if not unreasonable, having regard to the subject-matter of the contract.

A covenant not to carry on a manufactory in any part of Europe enforced (here).

by the Lord Justice Knight Bruce, and the Court of Queen's Bench, that it was a breach of the covenant (1).

20. There is no irrebuttable presumption against the legality of a covenant in general restraint of trade; and though all restraint which is unreasonable for the protection of the parties to a contract is bad, yet public policy enables a contracting party to enter into any stipulation, however restrictive, if such stipulation is not unreasonable, having regard to the subject-matter of the contract. And on an agreement for the purchase of the patents and processes for the manufacture of an article called "Crockett's American Leather Cloth," which contained a covenant not to carry on in any part of Europe any company or manufactory having for its object the manufacture or sale of productions then manufactured in the business of the vendors, nor to communicate to any person the process of such manufacture so as to interfere with the exclusive enjoyment by the purchasing company of the benefits to be purchased; it was held that this restriction was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers, and was capable of being enforced against the vendors. The Vice-Chancellor, Sir W. M. James, said: "All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this:—Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive

(1) *Turner v. Evans*, 2 De G. M. & G. 740.

it is, provided that restriction, in the judgment of the Court, is not unreasonable, having regard to the subject-matter of the contract" (1).

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21. Where a person, upon the sale of his business, agreed that he would not, during a term of five years, exercise or carry on the trade, either in his own name or that of any other person or persons, in the town of N., and he was afterwards found acting as the manager at N. of another person engaged in the same trade; on an interlocutory motion for an injunction to restrain him from so acting, the Court refused to make any order. The Lord Chancellor, Lord Hatherley, upon an appeal from a decision of Vice-Chancellor Sir W. M. James, said, he confessed he thought the case too doubtful to deal with on an interlocutory application; that the point was exceedingly nice, and exceedingly close upon the limit; and that, although one could not help expressing some degree of feeling as to the evasion that had been practised, having regard to the spirit of the contract, it was a little too much to say, upon this interlocutory application, that this gentleman was not to carry on business *simpliciter*, either in his own name or in that of another man, and should not act as the manager of another, he not conducting it in his own name—as in the case of *Dales v. Weaver* (2)—but in the name of the other person who employed him (3). Upon the hearing of the cause the Master of the Rolls, Lord Romilly, held that the managing the business of another person in the same trade in the town of N. by the vendor, at a weekly salary, was not a breach of the agreement. The Master of the Rolls said a man cannot properly be said to exercise or carry on a trade unless he receives some portion of the profits, and dismissed the bill; but as the defendant was obviously seeking to resume his old business, he dismissed it without costs; however, as in effect it was a rehearing of the motion for an injunction, since which no further evidence had been entered into by either party, he gave the defendant his costs incurred subsequently to the motion (4).

22. An agreement by a man not "directly or indirectly, either

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| (1) <i>Leather Cloth Company v. Lonsont</i> ,
L. R. 9 Eq. 345, 353; 18 W. R. 572;
39 L. J. (Ch.) 86; 21 L. T. (N. S.) 661. | (3) <i>Allen v. Taylor</i> , 18 W. R. 888;
19 W. R. 35. |
| (2) 18 W. R. 993; <i>v. post</i> , pl. 22. | (4) <i>Allen v. Taylor</i> , 19 W. R. 556;
39 L. J. (Ch.) 627; 22 L. T. (N. S.) 651. |

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alone or in partnership with, or with the assistance of, any other person, to set up or follow or practise" a particular business, is broken by his carrying it on as manager or assistant to another person (1).

23. Where the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying all ale, beer, and porter which might be consumed in any inn, public-house, or beershop which might be erected on the land, but the plaintiff did not enter into any covenant to supply it; and the defendant, a member of the society, who was also a brewer, acquired a portion of the land with notice of the covenant, and erected on it a public-house, which he supplied with his own beer; and the plaintiff filed a bill to restrain the defendant from supplying beer, alleging that the plaintiff had always been ready to furnish a sufficient supply of good beer at a fair price; Lords Justices Selwyn and Giffard held—affirming a decision of Vice-Chancellor Sir J. Stuart on overruling a demurrer—that the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade, or because it purported to be perpetual; and that, though it was in terms positive, it was in substance negative, and that the Court could interfere by injunction to restrain the defendant from acting in contravention of it (2).

Publication of a newspaper in violation of a contract, restrained.

24. In a case of *Robinson v. Phillips* (3) an injunction was granted, at the suit of the assignee of the defendant's bond, against publishing a newspaper in violation of a contract that the defendant would not thus publish within a certain town. That the tone of the paper was changed, was held no defence, nor that the contract was in restraint of trade.

Contracts restraining exercise of trade in particular localities are valid when there is a reasonable ground for the restriction.

25. In *M'Clurg's, &c.* (4), a case in Pennsylvania, U.S., Mr. Justice Sharswood said: "That contracts restraining the exercise of a trade or profession in particular localities, are valid when there is a fair and reasonable ground for the restriction, as in the case of the sale

(1) *Dales v. Weaver*, 18 W. R. 993.

(2) *Catt v. Tourle*, L. R. 4 Ch. 654;
21 L. T. (N. S.) 188; 38 L. J. (Ch.)
665; 17 W. R. 939.

(3) Mass. S. J. C., Suffolk, February,
1868, cited in Hill. Inj. p. 615, 2nd Ed

(4) Leg. Intel. (Philadelphia), cited
in Hill. Inj. p. 615, 2nd Ed.

of the goodwill of a trade or business, when the vendor covenants not to pursue the same business within certain prescribed limits, is beyond question ;” and, after stating that the appellee had therefore a legal right under his contract, he said, “Ought a Court of Equity to enforce it by injunction ?” And then, after observing that if Equity would enforce an implied contract within reasonable limits, he said, “*A fortiori*, it ought to do so in the case of an express one.” And then, citing *Butler v. Burlison* (1)—which he said was, like this, a contract between two practising physicians, and that it was enforced by injunction—he states the language of Williams, C.J., in the case, who said that: “Where there is an express covenant, and an uncontroverted mischief arising from the breach of it, Equity will grant an injunction to restrain the breach. In this case there is an express contract. The mischief arising from the breach of it cannot be repaired, nor can it well be estimated. A suit at Law would afford no adequate remedy, and the damages will be continuing and accruing from day to day, and furthermore the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms. It seems, therefore, to be a very proper case for a Court of Chancery to enforce the contract, by granting an injunction to prevent the breach of it, according to the acknowledged principle on which Courts of Equity act in similar cases.” And then, Mr. Justice Sharswood observed: “This agreement (in *M’Clurg’s, &c.*) was fully executed. The appellant removed, and the appellee, on the faith of it, gave up his practice at the place where he was before established, and settled in the new neighbourhood. He cannot be put *in statu quo*. We cannot by our decree restore to him the practice he has given up, nor could any damages a jury would give be an adequate compensation.” And he said: “The appellant has returned and established himself within the prescribed limits, in violation of his agreement. We agree with the Court below, that such a restraint as here (namely, not to practise within twelve miles) is not unreasonable; not greater than the appellee’s protection may require” (2).

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Where there is an express covenant, and the mischief from the breach cannot be repaired or estimated, Equity restrains the breach, or if the object of the contract can only be obtained by conforming exactly to its terms.

(1) 16 Vermont, 176 (Amr.)

(2) Hill. Inj. pp. 615-618, 2nd Ed.

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SECT. 10. *Business, Trades, &c.*

Though words of a circular may be literally true, yet if they tend to mislead public, the Court will restrain the issuing of the circular.

1. Although the words of a circular and card may be literally true, yet if they tend to mislead the public, the Court will restrain the further circulating or issuing such or any similar circular or card : so held in a case where the plaintiffs and defendants carried on business of a similar description, and on the expiration of a term in a lease of certain works to the plaintiffs, where they had carried on their business, the defendants fifteen months afterwards had procured a lease of the same works, with the exception of certain mines of clay, and issued a circular and card tending to lead the public to suppose that they had succeeded to the business of the plaintiffs, and were working the same material as the plaintiffs had formerly used (1).

Plaintiff, though deriving a right to use a name as a trade-mark from the same predecessor as another person, may sue alone to restrain infringement, to erase the name, and for an account of profits.

2. Where a plaintiff and another person, who carried on distinct trades at different places of business, had derived, from a common predecessor in their respective businesses, the right to use the name of "Dent" as a trade-mark, and the defendant had infringed this right ; Vice-Chancellor Sir W. P. Wood held, upon a demurrer, that the plaintiff, without averring special damage, might sue alone for an injunction, and for the delivery up of the articles so marked, to have the name erased (2), and, also, that he might sue alone for an account of profits made by the defendant out of articles so marked, and for payment to the plaintiff of such part of such profits as he should be entitled to (3).

A grant to the use, intent, and purpose, that certain trades shall not be carried on upon the premises, amounts to a stipulation in the nature of a covenant running with the land, and a breach by the grantee will be restrained.

3. In *Hodson v. Coppard* (4), the Master of the Rolls, Sir J. Romilly, held that a grant to A. and his heirs, to the use, intent, and purpose that the trade or business of a baker or confectioner should not at any time be carried on upon the premises granted, amounted to a stipulation in the nature of a covenant running with the land, by the grantee, not to carry on such trades upon the premises ; and where the grantee had let the property to a tenant who had committed and was committing the breaches complained of, but who had not been made a party to the suit, the same judge

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| (1) <i>Harper v. Pearson</i> , 3 L. T. (N. S.) 547. | (3) <i>Ib.</i> |
| (2) <i>Dent v. Turpin</i> , <i>Tucker v. Turpin</i> , 2 J. & H. 139. | (4) 29 Beav. 4 ; 9 W. R. 9 ; 30 L. J. (Ch.) 20 ; 7 Jur. (N. S.) 11. |

held that an injunction might be granted to restrain the grantee, his agents or servants, from carrying on such a trade, but that the injunction could not be extended to his tenant, as he was no party to the suit (1).

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SECT. 11. *Partnership.*

1. An innocent defendant cannot, under sect. 11 of the Common Law Procedure Act, 1854 (18 & 19 Vict. c. 125), stay proceedings in a suit for a dissolution of partnership on the ground of misconduct by a co-defendant, the articles of partnership containing merely an ordinary arbitration clause. The arbitration clauses commonly inserted in partnership articles apply only to questions arising upon the construction of the articles, and to matters of internal dispute thereunder, and not to a case where it is charged that the partnership articles have been wholly broken through, and a dissolution is sought on that ground. And where articles of partnership contained a clause providing for the reference to arbitration of all disputes and questions respecting the construction of the articles, the accounts and transactions of the partnership, and all matters relating to the partnership; and a bill was filed by one of the partners against his co-partners, charging improper conduct towards his partners, which, if proved, would have entitled the plaintiff to dissolution, and the prayer of the bill was for an injunction and a receiver; on a motion by the innocent defendant to stay the proceedings in the suit under the provisions of the articles, and the above-named sect. 11 of the Common Law Procedure Act, 1854, Vice-Chancellor Sir W. P. Wood held, that, assuming the charges in the bill to be true, the matter in dispute was not within the provisions of the arbitration clause, and the Vice-Chancellor thought an arbitrator would have no power under the articles to declare a dissolution in consequence of such conduct as charged; and, adopting the view that the onus of proof that an arbitrator could not give effectual relief, lies on the person proceeding otherwise than by arbitration, and thinking the plaintiff had sufficiently proved it, refused the motion with costs (2).

An innocent defendant (here) cannot stay proceedings in a suit for dissolution on ground of misconduct of co-defendant.

(1) *Hodson v. Coppard*, 29 Beav. 4; 9 W. R. 9; 30 L. J. (Ch.) 20; 7 Jur. (N.S.) 11.

(2) *Cook v. Catchpole*, 34 L. J. (Ch.) 60; 10 Jur. (N. S.) 1068.

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2. In *Turner v. Major* (1) an injunction was granted to restrain one of the partners from carrying on the partnership business on his own private account, and thereby diminishing the value of the partnership, and from impeding a receiver, and he was directed to account for the profits. In this case, by an agreement for a dissolution of partnership between A. and B., carrying on the partnership in separate districts, the machinery, plant, stock-in-trade, goodwill, and existing contracts, were to be offered for sale, and two persons appointed receivers of the partnership estate, and act in the winding-up of the same under the direction of the partners, and a notice had been issued, announcing the dissolution of the partnership, but afterwards B. used portions of the partnership property for the purpose of carrying on business of his own of the same kind in one of the districts.

A receiver operates as an injunction, and the Court will not appoint one, unless it sees there is an actual present dissolution arising from the acts of the parties, or that it would dissolve the partnership at the hearing.

3. Where a plaintiff had filed a bill for dissolution of a partnership entered into with the defendant, and moved for a receiver, and an injunction to restrain the defendant from interfering with the partnership assets, and a question was raised upon the evidence as to the conduct of the parties, and as to whether there was any term fixed for the expiration of the partnership; Vice-Chancellor Sir R. T. Kindersley held, that these questions must be decided at the hearing, and that the Court, not being able to say that a dissolution must be declared at the hearing, would not appoint a receiver, which would operate as an injunction. The Vice-Chancellor said: "A receiver operates as an injunction; and the principle on which this Court acts with regard to the appointment of a receiver in these cases is this; it will not appoint one upon a motion of this kind, unless it sees that there is an actual present dissolution arising from the acts of the parties, or that at the hearing it would, upon the merits, dissolve the partnership. If the partnership is a continuing one, and may continue, it will only direct an account. If partners agree upon a term for the partnership to continue, neither partner can dissolve the partnership until the end of the term. But if there be misconduct, this Court can and will before the time expires appoint a receiver; and the Court, though disinclined to such orders, will, on a proper case being made, appoint a receiver, on an interlocutory application.

But the case then to be made must not be one raising merely a question whether there is or is not misconduct as between the partners. The Court must, especially if there be no term, see its way to a dissolution at the hearing; and it must be remembered that where there is a dissolution, the appointment of a receiver is *primâ facie* a matter of course. The question whether there is or is not a term is one proper for the hearing, and is not one that the Court will try on an interlocutory application of this sort." Therefore the receiver was refused, and the rest of the motion ordered to stand over till the hearing, and the costs were reserved (1).

4. Where, in 1853, articles of partnership had been entered into between the plaintiff and J. H., whereby, after reciting the partnership previously existing, and that the effects consisted of a leasehold dwelling-house, workshop, and land at N., and that the plaintiff and J. H. were jointly entitled to another dwelling-house at M. A., it was agreed that J. H. should stand possessed of the property at N. as to the dwelling-house, and one-half of the land, for his own absolute use and benefit; and as to the workshop and other part of the land, in trust to assign the same to the plaintiff; and that when and so soon as the plaintiff and J. H. should erect a dwelling-house at M. A. of equal value with the dwelling-house at N., the same should be assigned to the plaintiff, who should thereupon re-assign the workshop to J. H.; and it was also agreed that an equal division should be made of the partnership effects, and that neither of the partners should apply any part of the co-partnership moneys or effects for his own private use until such division as aforesaid; and a renewed lease of the property at N. was afterwards obtained from the lessor by J. H. to himself alone, and the partnership continued for some time, but no assignment was made, nor was any dwelling-house built, as contemplated by the agreement of 1853; and J. H. afterwards assigned to G. M. the dwelling-house and half of the land at N., of which the plaintiff was then in possession, and G. M. commenced proceedings by ejectment in the County Court against the plaintiff, in order to obtain possession of the premises: on a bill filed by the plaintiff against J. H. and G. M., praying for a partnership account, and for an injunction against G. M., Vice-Chancellor Sir J. Stuart held, that

(1) *Baxter v. West*, 28 L. J. (Ch.) 169.

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from the circumstances which had arisen, J. H. was not entitled to hold the dwelling-house and half of the land at N. in severalty, but that the plaintiff had sufficient interest in the property to maintain his right to an injunction against G. M., J. H.'s assignee, from bringing ejectment, and an injunction was granted accordingly (1).

The power and authority of a sole solvent partner, upon bankruptcy of co-partner, to get in and sell partnership assets, are vested in him personally for partnership purposes, and cannot be transferred, either by assignment or suffering execution on a judgment.

5. The power and authority of a sole solvent partner, upon the bankruptcy of his co-partner, to get in and sell the partnership assets are vested in him personally for partnership purposes, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of "all his share and interest" in the partnership, or by exposing himself, although *bonâ fide*, to a judgment, under which all such share and interest is taken in execution; and, *semble*, that even the partner himself might in some cases be restrained (2). And where T. and K. being partners, T., on the 19th of February, was declared bankrupt, and on the 20th of February, the defendant, a judgment creditor of K., the then sole solvent partner, issued a *fieri facias* on all the partnership effects, which were made over to her by the sheriff, and the defendant advertised them for sale on the 27th of February, claiming to be the sole owner; and on the 26th of February a joint adjudication took place against T. and K., under which the plaintiff was the official assignee, and the defendant attempted to carry out the sale as advertised, but the official assignee entered, and forcibly obtained possession of the goods: on a bill filed by the assignee to restrain the defendant from proceeding to sell, and for a receiver, and for a sale and winding-up under the authority of the Court, Vice-Chancellor Sir W. P. Wood held, further, that a sale of partnership assets by an execution creditor of a solvent partner claiming the sole property is a tortious conversion, such as ought to be restrained, and that the previous violence of the plaintiff in taking and keeping possession of goods by force did not disentitle him to his remedy in Equity (3). Where in a separate commission against one partner the assignees took possession of the partnership joint effects.

A sale of partnership assets by an execution creditor of a solvent partner is a tortious conversion, and will be restrained.

Assignees in bankruptcy of one partner

(1) *Hawkins v. Hawkins*, 4 Jur. 496; 2 Jur. (N. S.) 880; 24 L. J. (Ch. N. S.) 1044. 445.

(2) *Fraser v. Kershaw*, 2 K. & J. (3) *Ib.*

and were proceeding to a sale, the Court granted an *ex parte* injunction on the filing of a bill by solvent partners to restrain the sale, on the terms of serving immediate notice on the assignees, but the solvent partners must offer to account for the plaintiff's share (1). Where, under a deed of partnership, it was provided that the assignees of any bankrupt proprietor should not become proprietors, but might procure some person to become a proprietor in respect of the bankrupt's shares, and that between the time of bankruptcy and of some person becoming a proprietor of such shares, the right and privileges attending such shares should remain in suspense; the Court held, that the solvent proprietors were entitled to an injunction against the assignee of a bankrupt proprietor, to restrain him from interfering with the partnership property, or with the management of the business of the partnership, but the solvent proprietors being entitled to the possession of the partnership property and effects, a manager or receiver was refused (2).

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restrained
selling joint
assets.

6. Vice-Chancellor Sir W. P. Wood refused a motion for an interim injunction to restrain a partner who, six months previously, being temporarily of unsound mind, had attempted to commit suicide, from interfering in the partnership affairs, the evidence not shewing that at the time of the motion he was incompetent to conduct the business of the partnership according to the partnership articles; but granted a motion in a cross-suit to restrain the defendants in such cross-suit from preventing the partner who had been insane from transacting the business of the partnership as a partner thereof (3). The circumstances that the conduct and state of mind of the partner in question were such as at once to destroy the confidence of the other partners, and to induce customers to withdraw their custom from the firm, and that the malady under which he laboured might as easily have led him to attempt the life of one of his partners, were held not to furnish sufficient ground for granting the first motion. The Vice-Chancellor said, it seemed to him to be now the settled law—and first, he said, he apprehended it quite settled, that the actual insanity of a partner is not of itself a dissolution of the partnership, but that it is necessary to obtain a decree for dissolution, and that the

Partner previously temporarily insane, not restrained from interfering with partnership affairs on that ground.

Actual insanity of a partner is not of itself a dissolution of partnership—there must be a decree.

(1) *Allen v. Kilbre*, 4 Madd. 464.

(2) *Francis v. Spittle*, 9 L. J. (N. S.) Ch. 230.

(3) *Anon.* 2 K. & J. 441.

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dissolution does not take place until the decree has been made secondly, that such a decree, notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made where there is any dispute on the subject, without a further inquiry whether, at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, according to the articles of partnership; and the Vice-Chancellor said that he apprehended that the affirmative of the issue would in that case lie with the party who had been of unsound mind, who would have to shew that he was so far restored as to be able to conduct the business: and, thirdly, that insanity existing when the relief is sought is good ground for a dissolution (1).

7. Where a partnership of a great number of persons had been constituted before the passing of the Joint Stock Companies Registration Act, the members subscribing a certain sum, and receiving a sort of scrip certificate, specifying the number of shares to which each was entitled, but no deed had been executed, nor had any register of shareholders been kept, and they occasionally held meetings, at one of which the defendant and another person were appointed sole directors and trustees of the property of the association, which consisted of mines, plant, and slaves, in the Brazils; and the defendant survived his co-trustee; and disputes having arisen a bill was filed against him by the plaintiff, who was a derivative shareholder by purchase of one of the scrip-certificates, for an account of the receipts and payments of the defendant, and of the debts of the association, and for payment of such debts, and a division of the profits, and for a receiver and injunction; and the defendant clandestinely left England for Brazil: Vice-Chancellor Sir W. P. Wood, observing that he need not determine upon this application whether the association was legal, held, that the plaintiff having been treated by the defendant as a member of the association, could maintain the suit, and that he had an equity to preserve and secure the property of the association, and for that purpose a receiver and manager was appointed of the property in the Brazils, and an injunction was granted to restrain the defendant from selling or disposing of or dealing with the mines, &c. (2).

(1) *Anon.* 2 K. & J. 441.

(2) *Sheppard v. Oxenford*, 1 K. & J. 491.

8. Where E. and H. were partners, under articles, and one of the terms was, that on the decease of either partner his personal representative should have the power, within three months, of electing to continue the share of the deceased partner, and if he declined, then the business, stock-in-trade, &c., were to be valued, and the surviving partner was to take the whole, giving security for the moiety late belonging to the deceased partner; and E. died; Vice-Chancellor Sir W. P. Wood held, that during the three months, or until E.'s personal representative should elect, the survivor (H.) was to be prevented by injunction from carrying on the business in any other firm than what had been used in the lifetime of E. (1).

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Where for three months from the death of a partner, his personal representatives had an election to continue deceased partner's share, surviving partner restrained carrying on the business in any other firm than what had been used.

9. Where in June, 1823, Morison, the sole inventor and proprietor of a medicine not protected by patent, upon the occasion of entering into partnership with Moat, as manufacturers and vendors of the medicine, for the purposes of the partnership communicated to the latter the secret of compounding the medicine, and by the partnership deed either partner was empowered to introduce another partner, by deed, to be attested by the other; and by mutual bonds of even date Morison bound himself not to communicate the secret of compounding the medicine to any person except a partner so introduced, whilst Moat bound himself not to communicate such secret to any person whomsoever; and Morison afterwards introduced his sons, the plaintiffs, into the partnership; and Moat, shortly before his death, in breach of his bond, communicated the secret to the defendant, his son, and then, by deed, duly attested by Morison, appointed the defendant his successor in the partnership; and shortly after the death of Moat the defendant joined Morison and the plaintiffs, who were ignorant that he had obtained a knowledge of the secret, in executing a partnership deed containing a clause declaring the defendant a sleeping partner, and another clause by which the partners covenanted not to divulge the secret of compounding the medicines to any person whomsoever, and the defendant also afterwards executed deeds reciting that the sole property in the secret was in Morison; and Morison afterwards died, having by will bequeathed his property in the secret to the plaintiffs, and after the deter-

The sale or making of a medicine, the secret of compounding which had been communicated to a partner, and by him to another partner, in breach of his agreement, restrained, as against the latter partner, after the determination of his partnership.

(1) *Evans v. Hughes*, 18 Jur. 691.

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mination of the partnership the defendant made use of his knowledge of the secret, communicated to him by his father, in manufacturing medicine, which he sold as the medicine originally manufactured by Morison : upon the application of the plaintiffs, Vice-Chancellor Sir G. J. Turner granted an injunction restraining the defendant, his agents, &c., from selling under the title or designation "Morison's Universal Medicine," or "Morison's Vegetable Universal Medicine," any medicine manufactured by the defendant or his order, &c., and from making or compounding any medicines according to the secret mentioned in the plaintiff's bill, and from in any manner using the secret of compounding the said medicines (1).

10. Where A. and B. and the son of B. entered into partnership as solicitors, and by articles agreed : (2), that the partners were diligently and faithfully to employ themselves in carrying on and managing all the professional business in which they or either of them might be employed or concerned : (5), that B. should use his best endeavours to obtain the appointment of the partnership firm to three offices or clerkships which were then held by B., and such offices should be partnership appointments : (6), that all other compatible offices should be obtained, if possible, in the name of the firm, and the emoluments treated as part of the profits of the partnership : (15), that if B. or his son should retire, or A. or B. or his son should die, the share of the deceased partner should accrue to the surviving partners ; and if B. or his son retired, they were to use their best endeavours to secure the practice to the continuing partners, and such retiring partner should not practise within thirty miles : (16), that if either partner should not diligently and faithfully employ himself in carrying on the said partnership practice, and should on receiving moneys, bills, notes, &c., knowingly or wilfully omit immediately to make entries thereof ; or if A. or the son of B. should absent himself more than two months in one year, the others or other of the partners, if they or he should think fit, should be at liberty to dissolve the partnership, by giving to the offending partner a notice to that effect, and the partnership should from that time, or the time specified in the notice, be dissolved, in the same manner and with the same consequences as if it had been

(1) *Morison v. Moat*, 21 L. J. (N. S.) Ch. 248 ; affirming S. C., 9 Hare, 241.

determined by the voluntary retirement of the offending partner ; and B. and his son subsequently procured their own appointment, or the appointment of one of them, to the offices or clerkships, and did not endeavour to procure the appointment of A. ; and it was afterwards discovered that B. was greatly involved in debt, and he absconded in January, 1849, and did not return to the business ; and in May, 1849, A. served a notice, in the manner pointed out by the articles, on B. and his son to dissolve the partnership from that date, and then filed his bill against B. and his son to have the dissolution declared by the Court, for an injunction to restrain them from practising within thirty miles, and a decree that they should resign the several offices or clerkships ; Vice-Chancellor Sir G. J. Turner held that the plaintiff was entitled to dissolve the partnership as to B., but not as against the other partner (the son of B.), and that he was not entitled to dissolve it by notice under the 16th clause, without the concurrence of his co-partner (the son) ; that B. not having procured or endeavoured to procure for the partnership firm the appointment to the several offices or clerkships, so as to give the plaintiff, at the dissolution, either a share of the profits of the offices, or the chance of competing for them, but, in direct breach of the covenant, such appointments having been procured for B. and his son to the exclusion of the plaintiff, B. and his son were not to be allowed to retain the offices for their exclusive benefit ; and that inasmuch as from the nature of the offices they could not be sold, nor could any manager or receiver be appointed to carry them on, the defendants ought to be charged with the value of the offices in the partnership accounts ; that although the partnership had not been effectually dissolved, under the 16th clause of the agreement, by the notice which had been given, yet the conduct of the defendant B. was such as entitled the plaintiff to dissolve as to him, though he could not alone do so under the provisions of the 16th clause. But the defendant B.'s son having adopted the notice, and treated the partnership as dissolved, the Vice-Chancellor held that the partnership should be considered as dissolved from the time of the notice, although not with the consequences attaching to a dissolution under the 15th clause ; that the consequences of a dissolution under the 15th clause not having attached, the plaintiff therefore was not entitled to the injunction

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to restrain the defendants from practising within thirty miles (1); and the agreement that if any of several partners should not diligently and faithfully employ himself in carrying on the partnership practice, the others might give notice of dissolution, was construed to refer to the diligent and faithful discharge, by each partner, of the portion of business carried on by himself (2); but the Vice-Chancellor held that designed or wilful omission to make proper entries in the partnership books should have been shewn, in order to have established (under the 16th clause) a case of breach of the partnership articles, on the ground of an omission to make such entries (3).

11. Where a bill (also praying discovery) stated that a partnership subsisted between the plaintiff in Equity and a deceased partner of a banking firm, in another concern in which the plaintiff had the chief management, and that cheques were drawn upon the bank under special circumstances, founded on a mutual understanding between the plaintiff and the deceased partner; but the answer of the surviving member of the firm denied any privity of defendants, or that they were in any way engaged in the particular concern of the plaintiff and deceased partner, as partners or otherwise, or that they had any knowledge of it; this was held sufficient to prevent an injunction to stay the defendants' proceeding at Law to recover the amount of the cheques paid by them on account of the plaintiff (4).

Mere temptation to violate partnership duties does not entitle to an injunction.

12. Mere temptation to the abuse of partnership effects is not sufficient to induce the Court to grant an injunction. In this case all the partners in a publication (a morning newspaper), except one, being also partners in another publication (an evening newspaper), and as to which circumstance, between two such publications, the Vice-Chancellor observed there is necessarily some degree of rivalry; an injunction to restrain the using of the effects of the former partnership to assist the latter, in consideration of an annual sum, was refused where there had been an agreement permitting the use on those terms, which had been acted on for many years; but the injunction was granted to restrain the use of partnership effects not included in the agreement. The Vice-Chancellor, Sir J. Leach, said:

(1) *Smith v. Mules*, 9 Hare, 556.

(2) *Ib.* 569.

(3) *Ib.*

(4) *Askam v. Thompson*, 4 Price, 330.

"The principles of Courts of Equity would not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern which, necessarily, gave them a direct interest adverse to that undertaking. But the argument here is, not that the defendants, by becoming the proprietors of the evening paper, place themselves in a situation in which they are necessarily required to betray their duty to the morning paper; but that if their interest be greater in the evening paper than in the morning paper, they are exposed to a temptation to be dishonest, and to betray their duty to the morning paper;" but he said, "If they act honestly, it is immaterial to the morning paper whether the defendants are or not the proprietors of the evening paper" (1).

13. In *Marshall v. Colman* (2) it was held that an injunction will not be granted to restrain the breach of a covenant in articles of partnership which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership; and the Lord Chancellor (Lord Eldon) doubted whether the Court would in any case grant such an injunction unless there was ground for, and the bill prayed, a dissolution of partnership. Lord Eldon, in his judgment, said: "There is only this point in the case now before me which I wish seriously to consider—viz., that although this Court will interfere where there is a breach of covenants in articles of partnership so important in its consequences as to authorize the party complaining to call for a dissolution of the partnership, whether (and it is a matter that will deserve a great deal of consideration before it goes so far) it will entertain the jurisdiction of pronouncing a decree (for this is what is to be done in the cause in which this motion is now made) for a perpetual injunction as to a particular covenant, the partnership not being dissolved by the Court. There is one case which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm; and the Court interferes then, because there is a ground for dissolving the partnership; but then the danger must be such—there must be that abuse of good faith between the members of the partnership—that the Court will try the question, whether the partnership should not be dissolved in consequence. But it is

(1) *Glassington v. Thwaites*, 1 S. & S. 124.

(2) 2 Jac. & W. 266.

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The Court will decree an account, appoint a receiver, compel a man to observe the covenants of a partnership deed, and will interfere where any act tends to destruction of partnership property, though no dissolution prayed.

quite a different thing, and it would be quite a new head of Equity, for the Court to interfere where one party violates a particular covenant, and the other party does not choose to put an end to the partnership (1); in that way there may be a separate suit and a perpetual injunction in respect of each covenant; that is a jurisdiction that we have never decidedly entertained." But in *Fairthorne v. Weston* (2) it was held that a bill for a partnership account and a receiver, during the existence of the partnership, is not demurrable merely on the ground that a dissolution is not prayed; and therefore in this case, where to a bill by one partner against another, alleging that the defendant, by conducting himself in violation of the partnership contract, excluding the plaintiff, and applying the assets to his own use, sought to force the plaintiff to dissolve the partnership before the end of the term, and praying an account of the partnership transactions and a receiver, but no dissolution, and the defendant answered one interrogatory, and, submitting that the bill was demurrable, declined, under the 38th Order of August, 1841, to answer the remainder of the interrogatories; exceptions for insufficiency were allowed. The Vice-Chancellor, Sir L. Shadwell, in his judgment, said: "The argument for the defendant turned wholly upon the proposition, that a bill praying a particular account is demurrable, unless the bill seeks and prays a dissolution of the partnership; in support of which the case of *Loscombe v. Russell* (3), and the cases there cited, were relied upon. That there may be cases to which the rule there laid down is applicable I am not prepared to deny, but the law as laid down in that case was never admitted to be a rule of universal application. *Harrison v. Armitage* (4), *Richards v. Davies* (5), and the unequivocal expression of the opinion of Lord Cottenham in *Taylor v. Davis* (6), and in *Wallworth v. Holt* (7), of the Vice-Chancellor of England in *Miles v. Thomas* (8), of Lord Langdale in *Richardson v. Hastings* (9), shews that there is no such universal rule at the present day; and I cannot but add, that it is essential to justice that no such universal rule should be

(1) *And v. Forman v. Homfray*, 2 V.

& B. 329; *Smith v. Jeyes*, 4 Beav. 503.

(2) 3 Hare, 387.

(3) 4 Sim. 8.

(4) 4 Mad. 143.

(5) 2 Russ. & My. 347.

(6) 4 L. J. (N. S.) Ch. 18; 7 L. J. (N. S.) Ch. 179; 3 Beav. 388, n., 395, n.

(7) 4 My. & Cr. 619.

(8) 9 Sim. 606.

(9) 7 Beav. 301.

sustained. If that were the rule of the Court—if a bill in no case would lie to compel a man to observe the covenants of a partnership deed—it is obvious that a person fraudulently inclined might, of his mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.” In *Miles v. Thomas* (1), where certain persons entered into an agreement in writing for forming themselves into a company, one of their rules being to manage the affairs by a committee, but no time being fixed for the duration of the company, and four of the members took upon themselves the exclusive management of a ship, the property of the company, and were about to send her on a voyage disapproved of by some of the members, whereupon the latter filed a bill to restrain the four from proceeding otherwise than under the direction of the committee, and to obtain delivery up to the committee of all books, &c., in their possession, a demurrer for want of equity was allowed. The Vice-Chancellor, Sir L. Shadwell, said: “I am of opinion that the Court ought to interfere between co-partners wherever the act complained of is one that tends to the destruction of the partnership property, notwithstanding a dissolution of the partnership may not be prayed. In this case, however, I am not asked to interfere because the ship, which is the subject of dispute, is in danger of being lost, but because she is about to be sent on a voyage which some of the members of the company disapprove. So that, in effect, I am asked to enforce the evanescent authority of a certain number of persons, which authority ceased as soon as any one of the members chose to rebel. That act was in itself a dissolution; and, *rebus sic stantibus*, I have no sort of jurisdiction to interfere” (2).

14. Where the plaintiff and defendant (partners) had agreed to dissolve, and that the defendant, on payment of half the value of the effects, should take the whole, though the defendant took possession, but failed to make the payment, and had begun to pull down part of buildings, the Court refused an injunction to restrain him. The Court said the plaintiff could only have an account of the partnership dealings for the purpose of ascertaining what was due to him under the agreement for a dissolution (3). Nor will

Partner not
restrained col-

(1) *Supra*.

(2) *Miles v. Thomas*, 9 Sim. 606, 609.

(3) *Coften v. Horner*, 5 Price, 537.

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lecting debts,
&c., unless
there is cul-
pable conduct,
or insolvency.
Surviving
partner, on
evidence of
being in em-
barrassed cir-
cumstances,
and spending
joint moneys,
restrained dis-
posing of joint
stock.

the Court treat as a bill to restrain waste a bill to restrain an acting partner from collecting debts, or creating them, and for appointing a receiver, though otherwise if the partner has been shewn guilty of culpable conduct, or is insolvent (1). In *Hartz v. Schrader* (2) Lord Chancellor Eldon granted an *ex parte* injunction to restrain a surviving partner from disposing of the joint stock, but refused it as to appointing a receiver, on a bill by the administrator of the deceased partner, the affidavit stating that the defendant was in embarrassed circumstances, and in Newgate for a separate debt, and spending the joint moneys on himself and family.

15. Where a partner had excluded his co-partner, the Court granted an injunction to restrain him from obstructing or interfering with his co-partner in the exercise and enjoyment of his rights under the partnership articles (3). And in *Greatrex v. Greatrex* (4) the Court granted an injunction to restrain the defendant, who had removed the partnership books from the place of business, from keeping them at any other place.

16. In *England v. Curling* (5) the Master of the Rolls, Lord Langdale, granted an injunction to restrain a partner, during the partnership term, from carrying on business with other persons in the name of the old firm, and from publishing notices of dissolution.

17. Where the master and part-owner of a ship purchased goods during the voyage, which his answer stated were purchased out of private property, and the profits of private trade during the voyage, but the Master of the Rolls, Lord Langdale, considered that there were strong grounds for thinking that the goods were purchased with partnership property, or with money for which the defendant was accountable to the partnership, and that they belonged to the partnership, he restrained the shipmaster from receiving the goods. Lord Langdale said he apprehended that there could be no doubt that the master of a ship was bound to employ his whole time and attention in the service of his employers, and that a partner in trade had no right to employ the

(1) *Lawson v. Morgan*, 1 Price, 303.

(2) 18 Ves. 317.

(3) *Hall v. Hall*, 12 Beav. 414.

(4) 1 De G. & Sm. 692.

(5) 8 Beav. 129.

partnership property in a private speculation for his own benefit; and, as to the custom of trade alleged by the defendant, which made it lawful for him to carry on such private trade as he did here, Lord Langdale said he could not, even if it were uncontradicted (which it was not), pay much attention to it on the present occasion. The master of a ship was an agent bound to give all his time and attention to his principal, and he thought that it would be very difficult to support a custom which, if legal, as alleged, would entitle him to trade for himself separately, when it was his duty to trade to the best of his ability for the joint interest of himself and the other owners, and would give him a discretionary power to place his own interest in competition with the joint interest, an option to give the advantage to himself whenever he pleased, without the knowledge of his co-owners, and without giving them notice of his proceedings in that respect; a custom, also, which would make it valid for a person in the relation of co-owner or partner, having complete control over the ship which was partnership property, to employ it at the joint risk for his private benefit; and that he could not, on the present occasion, assume that there was any such custom (1).

18. Where an agreement had been entered into between A. and B. (who were partners without any written articles) and persons in their employ, containing terms and provisions of a harsh description, and where one of the partners had filed a bill against the other for a dissolution of the partnership, the Court refused to interfere at the suit of the other partner to restrain the breach of the negative terms of the agreement (2).

19. In *Anderson v. Wallace* (3) the Court granted an injunction against a co-partner interfering in the management of the business (which was under a contract with the Postmaster-General for the service of the mail), where the effect of suffering him to interfere would be irreparable injury to the partnership business, by causing the contract to be put an end to. And in *Read v. Bowers* (4), upon a bill by one partner against another, alleging great abuses, the Court granted an injunction to restrain the defendant getting

The Court will not interfere where the provisions of a partnership agreement are harsh.

Partner will be restrained where his interference would produce irreparable mischief.

A partner committing great abuses, will be restrained getting in debts.

(1) *Gardner v. M'Cutcheon*, 4 Beav. 534.

(2) *Croft v. Haw*, 5 L. J. (N. S.) Ch. 305.

(3) 2 Moll. 540.

(4) 4 Bro. C. C. 441.

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in debts due to the firm, the defendant being in contempt, and served personally, and not appearing. But the Court will not, on the application of one partner, restrain another from using the partnership property or name, unless a case of misrepresentation or abuse is made out against him (1). But where a defendant denied charges in a bill of fraud and misconduct in the partnership, and explained others away, and alleged his inability to put in a full answer by reason that the plaintiff withheld improperly the partnership books, the Court would not grant the injunction prayed by the bill, but refused it without prejudice (2).

20. In *Smith v. Fromont* (3), where two persons had agreed to work a coach from Bristol to London, and one provided horses for a part of the road, and the other for the remainder, and, in consequence of the horses of one having been taken in execution, the other provided horses for that part which had been undertaken by the first, and claimed the whole profits of the journey; Lord Chancellor Eldon refused an injunction at the suit of the one whose horses had been taken in execution, against the other, the defendant continuing to provide horses. The Lord Chancellor said, that if he enjoined the defendant from bringing horses to convey the coaches between the limits in question, he must enjoin the plaintiff from *not* bringing horses there, and that he could not restrain the defendant unless he had the means of assuring him that he should find the plaintiff's horses ready.

Upon the death of one partner the name of the firm becomes the separate right of the survivor.

21. Where A. and B. carried on the business of pencil-makers under the firm of A. & L., and A. died, and B. carried on the business under the firm of B. & Co., successors to A. & L., and A.'s executor having commenced the same business under the firm of A. & L., the Court, at the suit of B., the surviving partner, granted an injunction to restrain A.'s executor from using that name or firm in carrying on his business. The Vice-Chancellor, Sir L. Shadwell, said he could not but think, and it was his opinion, when two partners carry on a business in partnership together under a given name, that during the partnership it was the joint right of them both to carry on the business under that name, and

(1) *Hawkins v. Blachford*, 1 L. J. (Ch.) 142. (2) *Littlewood v. Caldwell*, 11 Price 97.

(3) 2 Sw. 330; 1 Wils. 472.

that upon the death of one of them the right which they before had jointly becomes the separate right of the survivor; but said, that if the parties wished to have the question decided in a Court of Law, he would direct an action to be brought (1). And in *Webster v. Webster* (2) the Court, upon the suit of one executor of a deceased partner, refused an injunction to restrain two other executors of the deceased partner from using the name of the deceased partner in the trade carried on by them in partnership.

22. Where a deceased partner had contracted in his own name for a lease of premises to be employed in the partnership trade, the Court, at the suit of the surviving partner, refused to restrain the landlord from granting a lease to his representatives; but restrained, until further order, the representatives from disposing of the lease when granted, except for the benefit of the partnership, and for partnership purposes, and with the assent of the surviving partner (3).

23. In *Newell v. Townsend* (4) Vice-Chancellor Sir L. Shadwell, at the suit of a surviving partner, granted an injunction to restrain the sheriff from removing from the partnership premises, selling, or intermeddling with the partnership effects, where the goods of the partnership had been taken in execution for a debt due from the other partner, who died before the writ was delivered to the sheriff. The Vice-Chancellor said that a writ of execution bound the property in a debtor's goods only from the delivery of the writ to the sheriff (5), who was required to indorse on the back of the writ the day on which he received it; that in this case the property in the goods had vested at law in the plaintiff, the surviving partner, before the writ was delivered to the sheriff.

24. In *Jackson v. Sedgwick* (6) Lord Chancellor Eldon said, that partnership accounts might be taken in various ways; that the distinction was, that, in the absence of a special agreement, the accounts must be taken in the usual way; but that where a special agreement had been made it must be abided by, provided that the parties had acted on it; if not, that he always understood that the

(1) *Lewis v. Langdon*, 7 Sim. 421.

(4) 6 Sim. 419.

(2) 3 Sw. 490.

(5) *Vide* 29 Car 2, c. 3, s. 16.(3) *Alder v. Fouracre*, 3 Sw. 489.

(6) 1 Sw. 469, 470; 1 Wils. 297.

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articles were read in this Court as not containing the clauses on which the parties have not acted. And in this case it was held, that stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits during two years preceding, were waived in Equity by an omission through several years to settle annual accounts, and by engaging in business to which the stipulation could not be applied without injustice; and an injunction was granted to restrain the representatives of a deceased partner from proceeding in an action on a bond given by the surviving partners for repayment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained.

The Court will not interfere until the partners have tried the means of redress provided by the articles, unless there is a positive necessity.

25. Upon a bill by some (six) partners in a joint concern, on behalf of themselves and the others (except the defendants), 300 in number, for an account, a dissolution, and a receiver, &c., alleging circumstances of gross mismanagement and neglect by the managers, Lord Chancellor Eldon refused to interfere by an injunction, and the appointment of a receiver in the first instance, until they had tried the means of redress provided by the articles. Lord Eldon said, that if, however, a case of delinquency should be clearly made out, he did not hesitate to declare the Court would act; but that there must be a positive necessity for the interference of the Court, arising from the refusal or neglect of the committee (six of whom, out of twelve, were defendants) to act; that that might raise a case for prompt and immediate interference, which he could not say existed then; and that the plaintiffs had a remedy in their own hands, to which they had not resorted; but desiring to be understood not to repudiate the jurisdiction, but that he would not interfere before the parties had tried that jurisdiction which the articles had themselves provided (1). And in *Waters v. Taylor* (2) it was held, that although an agreement to refer disputes to arbitration is generally no objection to a suit in a Court of Equity; yet, upon the nature of the subject (the management of the Opera House), and the anxious provision of the parties for

(1) *Carlen v. Drury*, 1 Ves. & B. 154.

(2) 15 Ves. 10.

arbitration, the Court refused, upon motion, to interfere before they had taken that course. The Lord Chancellor, Lord Eldon, said that his argument was, that the *forum* they had provided for themselves, and the guard introduced by them against the *forum* of the country (whether effectually, he did not say), shewed their intention against the interference of any other jurisdiction until they had tried the effect of the special means provided by themselves; and that the object of this interlocutory motion was, therefore, in the nature of judicial relief against the effect of the express contract; and the Court ought, therefore, to be perfectly sure that the conduct of the defendant had been such as to make it proper, from regard to the interests of others as well as himself, that he should be removed from that situation in which the contract placed him.

26. The Court will entertain a bill to compel partners to act according to the provisions of instruments which they have executed, and, where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime. Thus where, in 1812, the then proprietors of Covent Garden Theatre executed a deed by which they covenanted that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits; and, in 1822, parties then entitled, under the former proprietors, to seven-eighths of the theatre entered into an agreement which provided in some respects for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject; Lord Chancellor Eldon, upon a bill filed by that party for the specific performance of the covenants and agreements contained in the deed of 1812, and an injunction to restrain the defendants from applying the rents and profits of the theatre to any other purposes than such as were agreed upon in the indenture, and to restrain them from conducting or managing the concerns of the theatre contrary to those provisions, and from excluding the right of interference on the part of the plaintiff as reserved by the terms of the deed, and for a receiver or treasurer of the theatre—appointed a receiver (1).

The Court will compel partners to act according to the provisions of the instruments they have executed.

(1) *Const v. Harris*, T. & R. 496, 529.

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A party taking the share of a partner cannot be let loose from that partner's obligations to the concern.

27. A party taking the share of a partner in a concern cannot be let loose from the obligations that partner is under to the concern (1); and Lord Eldon, in this case, asked whether a party (one of several co-proprietors of a theatre) having made a lease of his interest without the consent of his partners, might not apply for an injunction to restrain his lessees from doing any act prejudicial to that partner.

28. In *Lloyd v. Loaring* (2) Lord Chancellor Eldon allowed a demurrer to a bill by some members of a lodge of Freemasons against others, to have the dresses, decorations, books, papers, and other effects of the society, delivered up; and for an injunction, on the ground that they affected to sue as a corporate body; but leave was given to amend, Lord Eldon holding that this Court had jurisdiction for the delivery up of chattels, and where there is a joint interest permits some to sue as individuals representing the rest in other instances than those of creditors and legatees.

29. Upon a bill by a partner under a parol agreement, charging misconduct in the other partner, and praying a dissolution, account, and injunction from executing securities in the name of the firm, a demurrer to the prayer for a dissolution, because there was no writing between them, and that the prayer that the Court might do what they had a right to do for themselves was idle and nugatory, was overruled. The Lord Chancellor said there was no colour for the demurrer, and asked how the plaintiff was to have the account taken; and how he was to restrain the defendant from using the partnership name, and receiving the partnership debts? (3)

Upon non-performance of an agreement for a partnership, the Court will relieve from the payment of the agreed premium.

30. Where M. agreed with P. to pay him £1250, part in money (£600), and part in bills (£650), as the consideration for a partnership as a medical practitioner for twenty-one years, P. to introduce M. to his patients, and to be allowed to be absent for three months, but to take an active part in the business for three years; and P. was afflicted at the time with Bright's disease, and was absent for six months, and died of apoplexy; and P.'s representative sued M. upon the bills, and he filed a bill for an injunction

(1) *Const v. Harris*, T. & R. 496, 521, 528.

(2) 6 Ves. 773.

(3) *Master v. Kirton*, 3 Ves. 74; but see, as to this point, pl. 13, ante, p. 521.

to restrain actions upon two bills, part of the consideration, for an account, and return of part of the consideration or premium, alleging non-introduction to patients, protracted absence of P., and ignorance that he suffered from Bright's disease; Vice-Chancellor Sir R. T. Kindersley held, on the evidence, that M. was ignorant as alleged, that the party who fixed the consideration at £1250 was also ignorant of the fact, and that there was a very limited introduction to patients; and decreed an account, M. to be debited with the £600, but credited with so much as ought to be repaid to him, with an inquiry to ascertain the amount, but no costs were given on either side (1). The Vice-Chancellor said that the plaintiff did not get the introduction he bargained for, and the business naturally fell off; and that, under these circumstances, according to the law of this Court, a party might come, where accounts were to be taken between him and another person, and ask for relief with respect to the non-performance of the agreement between them.

31. Where a partnership was carried on for fourteen years between B. and G., under the style of "Banks & Co.," and on the dissolution the assets were divided, but no arrangement was come to as to the style; the Master of the Rolls held, that the name or style of "Banks & Co." formed an undivided asset of the partnership, which belonged to the partners in common after the dissolution, and that B. was not entitled to prevent G. using the style of "B. & Co." in his business. The Master of the Rolls (Sir J. Romilly) said that the name or style of the firm of "Banks & Co.," in which the defendants had been engaged for a period of fourteen years, was an asset of the partnership, and that if the whole concern and the goodwill of a business had been sold, the name, as a trade-mark, would have been sold with it; and that if, by arrangement, one partner takes the whole concern, there must be a valuation of the whole, including the name or style of the firm; but that if the partners merely divide the other partnership assets, then each is at liberty to use the name just as they did before, but that in this case the partners had divided the rest of the partnership property, and had left the name or style to be enjoyed in common (2).

The name or style of a firm, upon a dissolution of the partnership and a mere division of the other assets, belongs to the late partners in common.

(1) *Mackenna v. Parkes*, 15 W. R. 217. (2) *Banks v. Gibson*, 34 Beav. 556.

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32. Where a person has, in articles of partnership, covenanted not to do certain acts after a specified period of time, the Court will not before the arrival of that period grant an injunction to restrain him from acting in breach of his agreement, nor for mischief, which is no breach at law of the covenant between the parties (1).

The Court will restrain a partner from doing an intentional serious injury to the partnership property.

33. The Court will restrain a partner from doing an intentional serious injury to the partnership property ; but where proprietors of a newspaper dissolved partnership, and one of them agreed to purchase the whole, and before the completion, and pending a suit for specific performance, the purchaser published statements as to the profits and loss of the paper, in order to establish a company to carry it on, a motion for an injunction to restrain him was refused (2).

The Court will not interfere in favour of a party claiming under a bill of sale by one partner, where the assignee allows the other partner to mingle, undistinguishably,

34. Where A., claiming an interest in certain goods of a firm, under a bill of sale by B., one partner, of all his interest in such goods, allowed the other partner, C., to purchase other goods, and mingle them all together in the store, and execution was subsequently levied on all the goods, on a *bonâ fide* judgment against C., and A. failed to point out his goods to the officer, the Court held, that Equity would not interfere to defeat the judgment (3).

A sum borrowed by one partner on his own security does not become a partnership debt.

The proceeding with any execution upon partnership assets for a private debt of one of the partners will be restrained, and the execution creditor is only entitled to be paid his debt out of the debtor's share.

35. If a partner borrows a sum of money, and gives his own security only for it, it does not become a partnership debt by being applied for partnership purposes, with the knowledge of the other partner (4). In this case a bill was filed by one partner, which stated that executions had been levied upon the partnership stock, &c., in respect of private debts of the defendant, the other partner, and that the plaintiff thereupon had given notice of a dissolution to the defendant ; and prayed (*inter alia*) the usual partnership accounts, that the stock, &c., might be sold, and the produce applied in payment of the debts of the partnership, &c., plaintiff's share of the surplus paid to him, and that the execution creditors and the sheriff might be restrained proceeding in the executions, and selling the stock, &c., and paying over the pro-

(1) *Coates v. Coates*, 6 Madd. 287.

(3) *Chappell v. Cox*, 18 Ind. 513

(2) *Marshall v. Watson*, 25 Beav. (Amr.)

501.

(4) *Bevan v. Lewis*, 1 Sim. 376.

ceeds of the part already sold to the execution creditors. The Vice-Chancellor said that the judgments that had been entered up upon the securities for the sums in question must take their character from the securities on which they had been so entered up; and as those securities were executed by one only of the partners, they constituted the creditors joint proprietors only with the other partners, and that the accounts of the partnership estate and debts must therefore be taken in the manner prayed by the bill; and that the defendants would be entitled to be paid their debts out of the debtor's (the defendant partner's) share of any surplus that remained after all the demands on the partnership were satisfied (1).

SECT. 12. *Bankruptcy—Insolvency.*

1. Where a bankruptcy had been superseded, and the assignees commenced proceedings to annul the order on the ground of fraud, and filed a bill to restrain the bankrupt from getting the property into his hands, but the proceedings to restore the bankruptcy had been unsuccessful; the Court held, upon a motion by the assignees to dismiss their bill, that they were entitled (here) to have it dismissed without costs, as the Court can look at the circumstances of the case, and fraud had been practised on the part of the defendant (2). In this case the bankrupt was refused his certificate, on the ground of fraudulent concealment of property, and subsequently a consent order for annulling the bankruptcy was obtained, in consideration of a friend of the bankrupt paying a sum to the creditors; and after this, the assignees discovered that other property to a large extent had been concealed by the bankrupt, and they presented a petition to discharge the annulling order, as having been obtained by fraud, and before this petition had been heard, filed a bill to restrain the bankrupt from getting in the concealed property. The petition was ultimately dismissed by the Lord Chancellor, on the ground that the assignees having, when they consented to the annulling order, been aware of previous

(1) *And v. Lindley on Partnership*, 147; 10 Jur. (N. S.) 459; 10 L. T. 584-8, 590. (N. S.) 492; 12 W. R. 586.

(2) *Elsay v. Adams*, 2 De G. J. & S.

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fraudulent concealment, could not be held to have consented to the order on the faith of the bankrupt having made a full disclosure of his property, but that the proceedings in the cause ought to be stayed without costs.

2. An order by the Court of Bankruptcy for the sale of goods, as in the reputed ownership of a bankrupt, was, under the then Bankruptcy Act (12 & 13 Vict. c. 106) *ex parte*; and, *semble*, it could not be appealed against by the true owner; but the Court of Chancery had jurisdiction (notwithstanding such an order) to restrain a sale and determine the rights of the parties, and an application by the true owner to the Court of Bankruptcy for a stay of proceedings was not a bar to a subsequent bill for such an injunction (1).

3. Under the old law of Insolvency the Court of Chancery had no jurisdiction to restrain an assignee in insolvency from selling the property of the insolvent: so held in a case where an insolvent debtor had compounded with all his creditors except two, and had obtained his discharge, and the assignee under the insolvency, who was one of the unsatisfied creditors, after refusing a tender of the full amount of his debt, had proceeded to advertise for sale the property of the insolvent vested in him as assignee; and the insolvent filed a bill against the two creditors, praying an account, or directions for ascertaining what was due, and for an injunction to restrain the sale; but Vice-Chancellor Sir R. T. Kindersley held, upon demurrer, that this Court had no jurisdiction (2).

4. The messenger of the Court of Bankruptcy was, under s. 213 of the Bankruptcy Act, 1849, the officer of the official assignee, who was responsible for his conduct, both being under the control of the Commissioner in Bankruptcy; and an order having been made, vesting the estate and effects of a bankrupt in the official assignee, the official assignee could not be heard to say that he had no authority over the messenger. And where O. was assignee by a deed of 1851, by way of mortgage, of stock-in-trade of B., with a power of sale on default of payment, which having occurred, he took possession in

(1) *Mather v. Lay*, 2 J. & H. 374. See, as to the powers and jurisdiction of the Court of Bankruptcy under the present Bankruptcy Act, "The Bankruptcy Act, 1869," 32 & 33 Vict. c. 71, ss. 13, 65, 71, 72.
(2) *Pike v. Martin*, 7 Jur. (N. S.) 251; 30 L. J. 294.

June, 1858; and on the 9th of July following B. petitioned the Court of Bankruptcy under the arrangement clauses of the then Bankruptcy Act, and a protecting order had been made, and an official assignee appointed; and on the 21st of August an order was made vesting the debts due to the bankrupt in the official assignee, and that all his stock and effects should be taken possession of by the messenger in bankruptcy; and on the same day the messenger took possession, and on the 28th of the same month O. recovered possession, and in December advertised the property for sale, but the messenger refused to allow the auctioneer to make a catalogue; and the bankrupt and others shortly afterwards put O.'s agent forcibly out of possession; and on a motion on behalf of O. for an injunction to restrain the official assignee from selling, disposing of, or removing the goods, or interfering therewith, the official assignee argued that under the order which had been made he had nothing whatever to do with the property; and the messenger was not made a party to the suit: Vice-Chancellor Sir J. Stuart granted an injunction restraining the official assignee from selling, or disposing of, or removing the goods, or disturbing O.'s possession, till the hearing of the cause or further order, and also decided that the messenger had properly not been made a party (1).

5. The 17 & 18 Vict. c. 36 (the Registration of Bills of Sale Act) in no degree affects the doctrine of reputed ownership; and therefore, where A., a trader, on the 19th of April, 1856, executed to B. a bill of sale of furniture on the premises where he (A.) carried on business, the consideration being stated as for goods sold, money lent, and money for which B. had become responsible for A., and at the request of A. the bill of sale was not registered within the twenty-one days required by the 17 & 18 Vict. c. 36, but on the expiration of that time another bill of sale of the same furniture was executed in similar terms, and was not registered, and a third, a fourth, and a fifth bill of sale were in the same manner executed, and not registered; and ultimately a sixth was executed on the 5th of August, 1856, and was registered within the prescribed time, but none of the other bills of sale were cancelled; and A. was adjudicated bankrupt in December, 1856, the act of bankruptcy being committed in July previously, by being denied to his creditors;

The 17 & 18
 Vict. c. 36
 has not
 affected the
 doctrine of
 reputed
 ownership.

(1) *Overton v. Whitmore*, 5 Jur. (N. S.) 188; 7 W. R. 246.

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and assignees were appointed, who filed a bill against B., praying an injunction to prevent him from removing the furniture, and a declaration that the bills of sale were fraudulent and void, and that they might be delivered up to be cancelled: the Court held, that none of the bills of sale, nor the registration of the last, constituted a dealing or contract within the meaning of the 133rd section of the 12 & 13 Vict. c. 106, and such as was contemplated by that section, and by that section deemed valid; and that, notwithstanding the registration of the last bill of sale, the furniture remained in the order and disposition of the bankrupt. And, *per* Lord Justice Turner, the 17 & 18 Vict. c. 36 has in no degree affected the doctrine of reputed ownership (1).

Mortgage
(here) not an
act of bank-
ruptcy.

6. Where J. and G., being in trade as copper rolling manufacturers, had purchased the fee simple of an old silk-mill, and fitted it up with greatly improved and altered machinery and gear of every description fit for their trade, and they then mortgaged the land, mill, machinery, &c., to the plaintiff, with a covenant not to remove any part without permission of the mortgagee, and the money was to remain for seven years (this was stipulated by the lender); and J. and G. had at the date of the mortgage other property not included in it, and seven months afterwards J. and G. became bankrupts; Vice-Chancellor Sir W. P. Wood—upon a bill by the mortgagees against the assignees in bankruptcy, and certain second mortgagees, praying a foreclosure and an injunction against the assignees who had advertised for sale all the machinery upon the lands comprised in the mortgage—held, that the mortgage, although it comprised all fixtures then or thereafter to be placed on the land, and contained a covenant not to remove any of the particulars granted by the mortgage without the permission of the mortgagees, was not an act of bankruptcy, it appearing that the mortgagors had other property, that the mortgage-money was actually advanced, and that the transaction was clear of fraud, and, inasmuch as the mortgage did not put an end to all hope that the mortgagors would carry on the business, made the usual foreclosure decree (2).

(1) *Stansfield v. Cubitt*, 2 De G. & J. 222; 4 Jur. (N. S.) 395; 27 L. J. (Ch.) 266.
(2) *Mather v. Fraser*, 2 K. & J. 536; 25 L. J. (Ch.) 361.

7. The power of a solvent partner, upon the bankruptcy of his co-partner, to sell the partnership property is a personal authority, personal in himself in his capacity of partner, which he may exercise in that capacity to enable him to wind up the affairs of the partnership, and to pay the debts thereof, and cannot be assigned over to another as part of "all his right and interest" in the partnership, or by exposing himself, although perfectly *bonâ fide*, to a judgment, and allowing his share to be taken in execution. And therefore, where partnership goods had been taken in execution upon a *bonâ fide* judgment against a solvent partner, whose co-partner was bankrupt, upon a bill filed by the assignee, an injunction was granted to restrain the judgment creditor who had purchased all the share, right, and interest of the solvent partner in the goods, and had subsequently professed to sell the whole as her own property, from delivering possession of the goods to the purchaser; the Court also held, that the plaintiff had not deprived himself of his right to this injunction by his own misconduct in violently putting the defendant out of possession, though the defendant was a tenant in common with himself, the defendant wrongly insisting on her right to exclusive possession (1).

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The power of a solvent partner, upon bankruptcy of co-partner, to sell partnership property is personal as partner, and cannot be assigned.

8. In *Thompson v. Derham* (2), Vice-Chancellor Sir J. Wigram refused an injunction to stay the payment of a dividend by the assignees of a bankrupt, upon the principle that whatever questions have been decided in the Court of original jurisdiction which first adjudicated upon the subject, should be considered as well decided by a Court of merely concurrent (if it be so) jurisdiction.

Injunction to restrain payment of dividends by assignees refused.

9. In *Loundes v. Cornford* (3), Lord Chancellor Eldon granted an injunction upon an interpleading bill against bankrupts and their assignees, by a debtor to the estate, to restrain an action by the bankrupts against the debtor with the view of indirectly contesting the commission; he said he would never permit the bankrupts to proceed in this action to affect the commission.

Bankrupt restrained prosecuting an action intending indirectly to contest the commission.

10. Where a bankrupt, after the issuing of the commission and appointment of assignees, transferred French stock, his property, to his wife, who afterwards transferred it to her three sisters, and under two settlements the wife had an absolute power of disposing

Transfer of English stock of wife restrained, where bankrupt had

(1) *Fraser v. Kershaw*, 2 K. & J. 496.

(2) 1 Hare, 358.

(3) 18 Ves. 299.

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transferred
French stock
to her.

Where com-
mission not
proceeded
with, Court
refused to
restrain
(intended)
bankrupts
suing for
money at their
bankers.

Bankrupt
cannot be
joined with
assignees in a
bill for specific
performance of
a contract by
bankrupt—
nor for dis-
covery.

of sums of money in the English funds, which she exercised by will in favour of one of the sisters, and died in her husband's lifetime, and this sister, who usually resided in France, took out administration with the will annexed; an injunction was granted, at the suit of the assignee of the bankrupt, to restrain the trustees, in whom these funds were vested, from transferring them, on the ground that if the French stock should be proved to have been the property of the bankrupt, the assignees would have a claim upon the assets of the wife (1).

11. Where a commission of bankruptcy had issued against A. and B., but was not proceeded on, and A. and B. had a very large sum in the hands of their bankers, the Court refused, under these circumstances, to interfere to prevent A. and B. from recovering the money at Law from the bankers, although the commission remained in force. Mr. Justice Ashurst said the creditors might thank themselves for not proceeding to take out and sue a commission earlier (2).

12. Where a party against whom, under the then Bankrupt Law, a commission of bankruptcy had been maliciously obtained, and to whom, after superseding the commission, the Lord Chancellor had assigned the petitioning creditors' bond; had afterwards brought an action on the case against the petitioning creditor, and a rule of Court had been made by consent, referring the matter in dispute, except the bond assigned, to the award of an arbitrator, and an award had been made with an exception of the bond, it was held that an action could not be maintained on the bond, upon the principle that the action on the case was a waiver of the right to sue on the bond, and that to restore that right the agreement of the parties must be unequivocal (3).

13. In *Whitworth v. Davis* (4), Vice-Chancellor Sir T. Plumer allowed a demurrer by a bankrupt to a bill joining him with his assignees in charges and prayer for relief, viz., the specific performance of a contract previous to his bankruptcy, and for an injunction to restrain the assignees from proceeding for rent against the plaintiff in possession; and the Vice-Chancellor said, upon principle,

(1) *Stead v. Clay*, 4 Russ. 550; 1 Sim. 294.

(2) *Fuller v. Gibson*, 2 Cox, 24.

(3) *Holmes v. Wainwright*, 1 Sw. &

(4) 1 V. & B. 545.

and the direct authority of the Court of Exchequer (1), opposed by no decision, the bankrupt ought not to be made a party, even for the purpose of discovery. And in the case of *Griffin v. Archer* (2) the Court allowed a demurrer by a bankrupt to a bill praying a discovery and injunction in aid of an action at law. But upon a bill against a bankrupt and his assignees, charging a fraudulent bankruptcy to defeat the plaintiff's execution, and stating that under an agreement with the assignees for an arbitration the plaintiff deposited for sale goods which had been taken in an execution against the bankrupt prior to his bankruptcy, the produce to be in trust according to the award, that he had lost his copy of the agreement, and that the assignees had obtained the original from the person with whom it was deposited for the benefit of all parties, and refused inspection, and praying a discovery and injunction, the Court disallowed a demurrer by the bankrupt. The Lord Chancellor, in his judgment, said: "This is an experimental demurrer, not put in for the sake of this cause, but to feel the pulse of the Court for some other cause. There is no pretence for the demurrer. This is a bill stating a case for relief, a case of confederacy between the defendants; and the material party, and against whom a decree might be made—not, perhaps, for the specific relief prayed by this bill—is the bankrupt who has demurred. It is by the bill stated that under the operation of the commission, founded upon such an act, the plaintiff is defrauded of goods put into his possession for a *bonâ fide* debt" (3).

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But bankrupt can be joined where there is a charge of a fraudulent bankruptcy to defeat plaintiff's execution, and of possession of an agreement, &c., and a prayer for discovery.

14. Where a bankrupt, after certificate allowed, was sued for a debt due before his bankruptcy, the Lord Chancellor, reversing a decision of the Master of the Rolls, on the circumstances of the case, relieved against the judgment, and granted a perpetual injunction; though the Lord Chancellor seemed to admit, that where the case was only matter of misleading Equity should not relieve (4). But where G. brought an action for rent against the bankrupt, and obtained judgment before the allowance of his certificate, which not being allowed till after the rule was out, he could not plead it and take the benefit of 4 & 5 Ann. c. 17; but in the *sci. fa.* against the bail the certificate was pleaded, and the plea overruled, so that no

(1) *Griffin v. Archer*, 2 Anstr. 478.

(3) *King v. Martin*, 2 Ves. jun. 641.

(2) *Supra*.

(4) *Blackhall v. Combs*, 2 P. Wms. 70.

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Injunctions could be obtained in Bankruptcy under the old Bankruptcy Laws, but this Court could (and can) interfere in special cases.

This Court will not, at suit of *cestui que trust*, restrain assignees from distributing bankrupt's estate; but will decide the title to any specific portion of the estate, where plaintiff claims it.

remedy was left but in Equity, except by *audita querela*, which is an equitable remedy at Law: on a motion for an injunction the Lord Chancellor refused to grant one, because this was a merciful law made in favour of the bankrupts, and in prejudice of creditors, *ergo*, not to be extended in Equity (1).

15. In *Kirkpatrick v. Dennet* (2), it was held that where the object was to restrain a bankrupt from harassing his assignees by disputing, by means of an action commenced by him, the validity of the commission, that it should have been done by petition—that is to say, a petition in Bankruptcy; and Mr. Drewry, in his work on Injunctions (3), says, that it might be stated as the settled practice then, that an injunction in Bankruptcy was to be obtained on petition (4), though “the Court will interfere if a special case for its interference be made out” (5).

16. Upon a bill by *cestui que trust* against the assignees of the trustee, who had become bankrupt, for an account, and payment of what was due in respect of a breach of trust committed by the bankrupt, and to restrain the assignees from distributing his estate amongst his creditors, Vice-Chancellor Sir L. Shadwell refused the injunction, on the ground that the Court of Chancery had no jurisdiction, *simpliciter*, to restrain assignees from making a dividend of that which is admitted to be the estate of the bankrupt, at the suit of a person claiming as a general creditor, and not claiming any specific portion of that estate as being her property; the Vice-Chancellor said: “If the question had been whether any assets, any personal estate, or any other species of property which was in the hands of the assignee as part of the bankrupt's separate estate, was, in fact, the property of the plaintiff, this Court, I apprehend, would decide the question, because the jurisdiction in Bankruptcy has authority to deal only with that which is the bankrupt's estate, but has no power to determine what is the bankrupt's estate. If the question be a legal one, it must be tried at Law; and if it be an equitable one, it must be decided in this Court. But when you have determined what is the property of the bankrupt, the whole administration of it falls

(1) *Bagshall v. Gore*, 7 Vin. 131, pl. 5.

(2) 1 S. & S. 408.

(3) Page 309.

(4) *Vide*, now, the Bankruptcy Act,

1869—32 & 33 Vict. c. 71, ss. 13, 65, 71, 72.

(5) Kerr, Inj. 585, 153.

under the jurisdiction of the Court in Bankruptcy" (1); but as the case cited in *Eden* (2) might have induced the plaintiff to make the motion, it was refused without costs. And where plaintiffs in Equity, claiming to be admitted as creditors under the fiat in Bankruptcy in respect of a breach of trust by the bankrupt, which was the subject of the suit in Equity, applied, on a dividend of the bankrupt's estate being about to be declared, to be allowed to enter a claim upon the proceedings, and to have a fund reserved; and the application, being refused by the Commissioners, was renewed by petition to the Court of Review, when that Court made no order, but thought that the assignees should not pay any dividend until the petitioners had had an opportunity of applying to this Court; and they accordingly filed a supplemental bill, praying an injunction to restrain the assignees from paying any dividend which might be declared until the cause in Equity was heard, or without reserving a sufficient fund to answer the plaintiffs' demand; Vice-Chancellor Sir J. Wigram held, that if the Court of Chancery had jurisdiction to interfere in the distribution of the estate of a bankrupt, the Court ought, upon general principles, after an adjudication in Bankruptcy by the Commissioners, and then by way of appeal by the then Court of Review, which, the Vice-Chancellor said, was "a Court, at least, of concurrent if not of exclusive jurisdiction," on the subject of the distribution, to refrain from exercising such jurisdiction; and the Vice-Chancellor in his judgment said: "The sound principle in such cases would appear to be, that whatever questions have been or might have been decided in the Court of original jurisdiction which first adjudicated upon the subject, should be considered as well decided by a Court of merely concurrent jurisdiction" (3). And where an insolvent debtor and his wife conveyed estates belonging to the latter to trustees, to raise and pay £35,000 to the insolvent's assignees (who were parties to the deed), for the benefit of his creditors, and the insolvent died before that sum was raised, and after his death the assignees made a compromise with his widow, by which they agreed to accept from her a smaller sum, and one of the creditors filed a bill against the

Court refused to restrain, at suit of creditors, the carrying out a compromise between widow of insolvent and assignees.

(1) *Halford v. Gillow*, 13 Sim. 44; correcting *Atkinson v. Plummer*, cited in *Eden*, Inj. 298.

(2) *Atkinson v. Plummer*, ante.

(3) *Thompson v. Derham*, 1 Hare, 358.

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If Insolvent
Court had
jurisdiction,
this Court
would not
interfere.

assignees, the trustees, and the widow, charging them with collusion, and praying that the trusts of the conveyance might be performed, and that the defendants might be restrained from carrying the compromise into effect; Vice-Chancellor Sir L. Shadwell allowed a demurrer by the assignees for want of equity, on the ground of want of jurisdiction, as the plaintiff ought to have applied to the Insolvent Debtors Court to have the assignees removed, "which (the Vice-Chancellor said) would have given the plaintiff all the relief he sought by this bill." The Vice-Chancellor said that "a particular arrangement was made, which was, in effect, giving up to a certain extent the particular right, whatever that might be, which was derived from Sir Thomas Champneys (the husband) in consideration of a certain sum, so that that sum would be assets received by the assignees under the insolvency; and, *prima facie*, that sum would have to be applied and to be accounted for by the assignees under the jurisdiction of the Insolvent Debtors Court" (1). And in *Maguire v. O'Reilly* (2), it was held that if the Insolvent Court had jurisdiction to grant the relief sought, a creditor of the insolvent ought not to have instituted a suit in Equity to obtain the same relief; and, therefore, a bill filed by a creditor to restrain the assignee from selling the insolvent's estate, on the ground that his conduct, in relation to the intended sale, was fraudulent, was dismissed with costs. And in *Perry v. Walker* (3) the Court refused, under special circumstances, an injunction to stay proceedings in the Court of Bankruptcy under 1 & 2 Vict. c. 110, s. 8 (then in operation), after a decree in this Court for an account against the party taking those proceedings. The Vice-Chancellor, Sir L. Shadwell, said that if this were a case in which on general grounds the defendant ought to be prevented issuing a fiat, the Lord Chancellor, or the then Court of Review, was the proper quarter to which to make an application on the subject. And where a creditor had sued out a judgment-debtor summons, and afterwards, but before the day fixed for the appearance of the debtor, the debtor executed and registered a composition deed under sect. 192 of the Bankruptcy Act, 1861, which deed the creditor never executed, and the debtor filed a bill in Equity to restrain proceedings on the summons.

(1) *Yewens v. Robinson*, 11 Sim. 105. (2) 3 J. & Lat. 224; 2 Ir. Eq. 335.

(3) 1 Y. & Coll. C. G. 672.

on motion for an injunction to that effect, Vice-Chancellor Sir R. Malins declined to restrain the creditor. The Vice-Chancellor said that the application was made on the ground that the deed operated as a release of the debt; but that if it could be treated as a release in this Court it would be so treated in the Court of Bankruptcy, and refused the motion for an injunction with costs (1). But in *Attwood v. Banks* (2) the Master of the Rolls, Lord Langdale, held that this Court had jurisdiction to restrain a party, upon equitable grounds, from taking proceedings under the said Act (1 & 2 Vict. c. 110, s. 8), to make a party a bankrupt. In this case, partners being indebted to their bankers, it was agreed between them that one should retire, that the assets should be transferred to the continuing partners, who were to take upon themselves the partnership liabilities, and that the bankers should release the retiring partner from his liability. The bankers signed a memorandum acceding to the agreement, and having afterwards attempted, by means of the debt, to make the retiring partner a bankrupt, they were restrained from so doing by an injunction. But in *Pim v. Wilson* (3) it was held by Lord Chancellor Cottenham, overruling a decision of Vice-Chancellor Sir L. Shadwell, that proceedings by a creditor under this statute, 1 & 2 Vict. c. 110, s. 8, with a view to making the alleged debtor a bankrupt in default of his satisfying the demand, would not be interfered with in a Court of Equity, on the ground merely of an allegation that such proceeding was dictated purely by fraud and malice, and that no debt was in fact due.

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This Court has jurisdiction to restrain, upon equitable grounds, proceedings to make a party bankrupt.

17. Plea to a bill for specific performance of an agreement for a lease to the plaintiff, and an injunction against an ejectment, that the defendant had, since the bill filed, taken the benefit of an Insolvent Act, was overruled on the ground that this circumstance did not exist when the bill was filed, and that the consequence was that the assignee must come in by a supplemental suit (4).

18. In *Bell v. Bird* (5) Vice-Chancellor Sir G. M. Giffard held that the administration of the trusts of a creditors' deed, which has

Administration of trusts of creditors' deed

(1) *Berkeley v. Dicker*, 15 W. R. 899.

(2) 2 Beav. 192.

(3) 2 Ph. 653.

(4) *De Minckwitz v. Udney*, 18 Ves. 466; *et v. Williams v. Kinder*, 4 Ves. 387.

(5) L. R. 6 Eq. 635; 16 W. P. 1165.

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under Bankruptcy Act, 1861, belongs to the Court of Bankruptcy; and this Court will not, in ordinary circumstances, entertain a suit for the administration of the trusts of such a deed.

But this Court can appoint a receiver, to prevent irreparable mischief from breach of covenant.

been assented to and registered, so as to render it valid and binding under the provisions of the Bankruptcy Act, 1861, s. 192, belongs exclusively to the Court of Bankruptcy; and allowed a demurrer for want of jurisdiction to a bill filed by creditors on behalf of themselves and all other persons entitled as creditors to the benefit of the deed, asking that the trusts of the deed might be carried into execution under the decree of the Court, and praying a receiver, and injunction to restrain the defendants, the debtor and the two trustees of the deed, from getting in or intermeddling with the estate. In *Martin v. Powning* (1), Lords Justices Selwyn and Giffard held that the Court will not, in ordinary circumstances, entertain a suit for the administration of the trusts of a deed registered under the Bankruptcy Act, 1861; and they also held—reversing a decision of Vice-Chancellor Sir J. Stuart—that the allegations in the bill, that the defendants, the trustees of the creditors' deed, had made large profits by supplying the estate with goods while the debtor's business was going on under their superintendence, and that they had made large payments out of the estate in exoneration of the liability which they themselves were under as sureties for the payment of certain instalments by the debtor, did not take the case out of the general rule, the Court of Bankruptcy having sufficient powers to enable it to deal with such questions. But this Court has jurisdiction to appoint a receiver, where it is necessary, to prevent irreparable mischief from breach of covenant, although the property may have to be distributed in Bankruptcy, and though the Court of Bankruptcy may be able to give the same relief (2). In *Stone v. Thomas* (3), Lord Chancellor Hatherley held that the jurisdiction of the Court of Chancery in the administration of creditors' deeds was not excluded by the Bankruptcy Act, 1861; but that the Court of Chancery would not exercise its jurisdiction except in cases where the Court of Bankruptcy was unable to give adequate relief. And where a creditor filed a bill against the trustees of a creditors' deed, alleging that one of the trustees had purchased some of the property at an

(1) L. R. 4 Ch. 356; 38 L. J. (Ch.) 16 W. R. 1072.

212; 20 L. T. (N. S.) 133; 17 W. R. 386.

(2) *Riches v. Owen*, L. R. 3 Ch. 820;

(3) L. R. 5 Ch. 219; 39 L. J. (Ch.) 168; 18 W. R. 385; 22 L. T. (N. S.)

359.

undervalue, and praying that the sale might be set aside, and the trusts of the deed administered by this Court; the Lord Chancellor held, that this was not a sufficient ground for the exercise of the jurisdiction of this Court, and dismissed the bill with costs. And where a debtor, by a deed registered under the Bankruptcy Act, 1861, covenanted, when required, to assign his estate to inspectors to be administered as in Bankruptcy, and he afterwards became bankrupt, and the inspectors filed a bill against the assignee in Bankruptcy, and a mortgagee of the debtor, claiming the balance in the hands of the mortgagee; Lord Chancellor Hatherley held, affirming the decision of the Master of the Rolls, that the Court of Chancery would not exercise its jurisdiction between the inspectors and the assignee, as both were subject to the Court of Bankruptcy (1).

19. Where a married woman gave up to her husband £500, held upon trust for her separate use, upon the understanding that the husband would settle his furniture upon her for her separate use, and the husband assigned the furniture to a trustee to hold for the use and benefit of his wife; and the property remained in the joint possession of the husband and wife, but the assignment was not registered under the Bills of Sale Act (17 & 18 Vict. c. 36); and the husband afterwards became bankrupt: upon a bill filed by the wife, praying that the deed might be reformed, for the purpose of creating thereby a binding trust of the furniture and effects for the separate use of the plaintiff, and that in the meantime the defendant B., the creditors' assignee, might be restrained from selling or holding possession of such furniture and effects, Vice-Chancellor Sir R. Malins held, that independently of the Bills of Sale Act the plaintiff would have been entitled to have the furniture secured for her separate use; but that the assignment operating as a bill of sale came within the Act, and not being registered under the Act, the furniture remained in the order and disposition of the bankrupt, and could not be protected against the assignee, and dismissed the bill with costs (2).

20. Although, where a trust has been created for an illegal

The Court will interfere

(1) *Phillips v. Furber*, L. R. 5 Ch. 746; 18 W. R. 985; 22 L. T. (N. S.) 707. (2) *Ashton v. Blackshaw*, L. R. 9 Eq. 510; 39 L. J. (Ch.) 205; 18 W. R. 307; 21 L. T. (N. S.) 197.

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where illegal purpose of a trust fails, and assignee with notice of a trust to defeat creditors, directed to re-assign.

purpose, the Court will not in general interfere, it will do so where the illegal purpose fails to take effect. Where, therefore, the plaintiff, being in pecuniary difficulties, assigned certain leasehold property to a trustee with the view of defeating his creditors, and two-and-a-half years afterwards was adjudicated bankrupt, but obtained the sanction of the creditors, under s. 110 of the Bankruptcy Act, 1861, to an arrangement by which his estate and effects were re-vested in him, he covenanting to prosecute a suit for the recovery of the assigned property, and to pay a composition of 2s. 6d. in the pound to his creditors in case such suit had a successful termination; the Master of the Rolls, Lord Romilly, held—upon a bill filed by the plaintiff, praying that the defendant might be declared to be a trustee of the property for the plaintiff, and might be ordered to convey the same to the plaintiff, and for an injunction to restrain the defendant from receiving or intermeddling with the rents and profits, and from proceeding with an action at law to recover possession—that the plaintiff was entitled to have the property re-conveyed to him by the defendant, who claimed by assignment (charged in the bill with notice) from the original trustee (1).

The Court will restrain, by interlocutory injunction, the alienation of property conveyed by a deed alleged to be fraudulent as against creditors.

21. Where, by deed, a father and son settled certain real estate to the use of the father for life, and after his decease to the use of the son, if then living, in fee; and a power was reserved to the father and son of revoking the uses and appointing new uses; and by a subsequent deed, the son being at the time insolvent, the father and son revoked the old uses in favour of the son, and appointed the estate to such uses as the father should appoint, and in default of appointment to the use of the son absolutely; and the son was afterwards adjudicated bankrupt; and a bill was filed by the creditors' assignees to set aside the latter deed as fraudulent and void as against the creditors—an interlocutory injunction was granted restraining the father, until the hearing, from exercising his power under the deed in favour of a purchaser for value, but without interfering with the exercise of his power in favour of volunteers. The Vice-Chancellor, Sir R. Malins, said, in such a case registration of the suit as a *lis pendens*, under 2 & 3 Vict. c. 11, would be a very doubtful protection, because it might be so

(1) *Symes v. Hughes*, L. R. 9 Eq. 475; 39 L. J. (Ch.) 304; 22 L. T. (N. S.) 462.

registered as not to give any notice of the real object of the suit as affecting this property (1).

22. Equity will relieve against the suing out or levy of execution upon a judgment enjoined, which has been discharged by proceedings in Bankruptcy (2). So a perpetual injunction will be granted against a suit upon a claim proved against the estate of a bankrupt in the United States District Court, but afterwards contested by the debtor or assignee, and expunged (3).

23. A creditor's bill, to enjoin a debtor from proceeding to obtain his discharge under the insolvent law of New York, must shew special cause for the injunction (4).

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Equity relieves against a judgment discharged by proceedings in bankruptcy. So a suit will be restrained on a claim expunged in bankruptcy.

SECT. 13. *Bills of Sale—Sales—Alienations—Mortgages.*

1. Where the plaintiffs, farmers, had agreed with their father for the use of a barn and yard on his premises, wherein to put their carts and farming implements, and an injunction had been granted to restrain the sheriff from selling the goods of the plaintiffs found upon the lands of their father, against whom execution had issued upon a judgment at Law, the Court, upon a motion to dissolve, held that, there being no trust, and the plaintiffs having their remedy at Law, a Court of Equity would not interfere by injunction (5).

2. A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction. And where the plaintiff delivered tea-warrants made payable to the broker, as a security for advances by the broker on behalf of the plaintiff, and the broker afterwards, without the knowledge of the plaintiff, although the plaintiff was afterwards acquainted with it and

(1) *Beyfus v. Bullock*, L. R. 7 Eq. 391; 17 W. R. 526; 20 L. T. (N. S.) 166.

(2) *Peatross v. McLaughlin*, 6 Gratt. 64 (Amr.)

(3) *Pease v. Bennett*, 17 N. H. 124 (Amr.)

(4) *Shanck v. Sniffen*, 1 Barb. 32; *v. Hilliard*, Inj. 39, 211, 392-402, 2nd Ed., on injunctions in the United States in matters of bankruptcy and insolvency.

(5) *Jackson v. Stanhope*, 15 L. J. (N. S.) Ch. 446; 10 Jur. 676.

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received the benefit of the transaction, indorsed and re-pledged the warrants to C., to secure advances made by C. to the broker, but of which, unknown to C., the plaintiff was to have the benefit; Lord Chancellor Cottenham, upon a suit by the plaintiff against the broker and C., the holder of the warrants, praying to redeem the property in pledge on payment of any balance found due on the account between himself and the broker, held—reversing a decision of Vice-Chancellor Sir L. Shadwell—that the plaintiff had no equity to restrain the holder from proceeding to an immediate sale (1).

3. There is no exclusive right in a subject (in this case a secret medicine or syrup) not protected by patent to prevent a sale by another person under the same title, that other person not assuming the name and character of the plaintiff. The Vice-Chancellor, Sir. T. Plumer, upon allowing a demurrer to the bill, said that the defendant merely represented that he sold, not the plaintiff's medicine, but one of as good a quality, and that he was at perfect liberty to do so (2).

4. Although in *Pechel v. Fowler* (3) it was held that on a trust to sell an estate a suggestion in the bill, by the owner of the estate, of improper conduct of the trustees in not giving sufficient notice of the sale, there being no case made of irreparable injury, was not a ground for an injunction to stop the intended sale; for if the trustees sold in such a manner as to commit a breach of trust, they would be liable. But in *Attorney-General v. Mayor of Liverpool* (4), the Master of the Rolls said that it had become the invariable practice, when any act involving breach of trust was intended to be done, though not in its consequences irremediable—where, for instance, trustees contracted to sell without proper care, or in a way which the parties interested considered inconsistent with the trust, to apply to the Court to prevent them; that the case cited (i.e. *Pechel v. Fowler* (5), which he said he believed had been overruled as often as it had been considered) would go to this extent,

Trustees contracting to sell without proper care, or inconsistent with the trust, will be restrained.

(1) *Nicholson v. Hooper*, 4 My. & Cr. 179; 2 Jur. 9. see the Exhibition Medals Act, 1862. 26 & 27 Vict. c. 119.

(2) *Canham v. Jones*, 2 V. & B. 218. (3) 2 Anstr. 549.

See *Morison v. Moat*, 9 Hare, 241; and (4) 1 My. & Cr. 171, 210.

(5) *Supra*.

that the Court ought never to interfere—parties might deal with the property just as they pleased, and while the suit was pending no new right could be acquired; that, without adverting to more recent authorities, or to modern practice, the case of *Curtis v. Marquis of Buckingham* (1), and another in *Vesey* (2), proved that such was not the practice, at least of this Court, whatever might have been the rule in the Court of Exchequer.

5. In *Harcourt v. Ramsbottom* (3) the Court refused an injunction to restrain the exercise of a power of sale given to secure a balance to be ascertained by an arbitrator, although the award was made after the plaintiff had executed a deed for the purpose of revoking his authority. Lord Chancellor Eldon, in answer to the argument that the award was not good because the authority was revoked, said that if it was revoked at Law he could not have considered it (under the circumstances of this case) as revoked in Equity.

6. At Law non-existing property to be acquired at a future time is not assignable; in Equity it is so. At Law, although a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in Equity the moment the property comes into existence the agreement operates upon it. And where T., being tenant of a mill and premises, by deed assigned to B. all the machinery in or about the mill, upon trust for securing payment of £5000 to H.; and the deed recited that the machinery specified in the schedule thereto belonged to H., and that T. had agreed with H. for its purchase, but that, being unable to pay the purchase-money, it was agreed that the same should remain unpaid, and be secured in manner therein expressed, and the machinery was assigned to B. upon trust for T. until demand was made of the purchase-money, and then for T. absolutely, if he paid it; but, in default, to sell and pay the proceeds in satisfaction of the money due on the security; and the deed provided that all the machinery which, during the continuance of the security, should be fixed or placed in or about the mill, in addition to, or substitution for, the said premises, should be subjected to the same trusts; and the schedule comprised

Non-existing property to be acquired at a future time is assignable in Equity, and equitable mortgagees of such property have priority over a judgment creditor.

(1) 3 V. & B. 168.

(and see *Anon.* 6 Madd. 10).(2) *Echiff v. Baldwin*, 16 Ves. 267

(3) 1 Jac. & W. 505.

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specified articles, and all other the machinery in or about the mill; and the deed was registered as a bill of sale; and after the date of it T., who remained in possession of the mill, placed other machinery there in addition to, and substitution for, that which was there at the date of the deed, of which he gave notice to H.; the House of Lords (reversing a decision of Lord Chancellor Campbell, and affirming that of Vice-Chancellor Sir J. Stuart, which had been reversed by Lord Campbell), upon a motion for an injunction to restrain the sale of the machinery, &c., held that, as between H. and a judgment creditor of T. who had issued a *fi. fa.*, under which the sheriff seized the added or substituted machinery, and sold part, B. was entitled to all the machinery in the mill at the date of the execution, including the added and substituted machinery, on the ground that immediately on the new machinery and effects being fixed or placed in the mill they became subject to the operation of the contract, and passed in Equity to the mortgagees as equitable owners, to whom T. was bound to make a legal conveyance, and for whom he was in the meantime a trustee of the property, the equitable mortgagees having priority over the execution creditor without the formality of taking actual possession (1). And, *per* Lord Chelmsford, there is no ground for excluding sales of future-acquired property from the provisions of the 17 & 18 Vict. c. 36 (2).

7. Where A. B. assigned the lease for twenty-one years of a house in which he resided, together with two policies of assurance upon his life, to the defendant by way of mortgage, to secure the repayment of £250 and interest, as well as the premiums upon the policies; and the mortgage-deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagee in respect of the leasehold house at the yearly rent of £175, provided that the mortgagee might at any time, without notice, take possession of the premises, and determine the tenancy; and there was no specific provision that any part of such rent should be applicable to the principal of the debt; and the mortgagor became bankrupt, and the mortgagee distrained upon the furniture in the house, which was not the property of A. B., for a year's rent under

(1) *Holroyd v. Marshall*, 9 Jur. (N. S.) 213; 11 W. R. 171; 9 W. R. 303.

(2) *Ib.*

the attornment clause, though at that time the landlord's rent of £115, the interest upon the money advanced, and the premiums upon the policies, had been paid: upon a demurrer to a bill praying an injunction to restrain the defendant from disposing of, retaining possession of, or interfering with, the furniture and household effects, goods, and chattels of the plaintiff in the house, and that the defendant might pay damages for the wrongful seizure and detention of such furniture, goods, and chattels, Vice-Chancellor Sir R. Malins held, that the attornment clause was not intended to enable the mortgagee to repay himself any of the capital advanced, but only to secure the payment of rent, interest, and premiums. The Vice-Chancellor said that he came to the conclusion that the power of distress was intended merely to secure the different outgoings payable under the deed—that is to say, the rent of the house to the landlord, the interest upon the money advanced, and the premiums upon the policies—and that it was not the intention to enable the mortgagee to obtain repayment by distress of any part of the principal; and granted an injunction, but without prejudice to any right of the defendant to distrain for rent due since the date upon which the above-mentioned distress was made (1).

8. Where a bank recovered a judgment against A. for \$59,000, and B., assuming to act as agent and attorney of the bank, effected a compromise with A. to pay \$20,000, and A. assigned and delivered over to B., as agent and attorney, property and securities to that amount, and the bank denied the authority of B. to make the compromise, and A. assigned the property and securities to C., and B. refused to redeliver them, and was proceeding to collect and dispose of them; upon bill filed by C., an injunction was granted to restrain the collection and disposition of the property and securities; and the Chancellor refused to dissolve the injunction, on motion to dissolve, for want of equity in the bill (2).

9. Where there is a mortgage upon the capital stock of a corporation, and the treasurer is one of the mortgagees, an injunction will be granted to stay a sale under a power in the mortgage until

(1) *Hampson v. Fellows*, L. R. 6 Eq. 575; 37 L. J. (Ch.) 694; 19 L. T. (N. S.) 6. (2) *Pratt v. Campbell*, Harring, Ch. 236 (Amr.)

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the treasurer shall furnish to the mortgagor any information relative to the condition of the corporation, and affecting the value of the stock, which the treasurer may have obtained by virtue of his office, beyond what appears from the books of the corporation (1).

SECT. 14. *Judgments—Charge—Executions.*

Judgment creditor cannot obtain a charge on an equitable debt by analogy to attachment of a legal debt under the garnishee clauses of Common Law Procedure Act, 1854.

1. A judgment creditor cannot obtain a charge in Equity on an equitable debt by analogy to an attachment of a legal debt under the garnishee clauses of the Common Law Procedure Act, 1854 (2). A judgment debtor was entitled under a will to one-fourth of the profits of a business, which was managed by trustees, subject to a condition of forfeiture if he alienated or charged his share. A sum of money arising from the business was standing at the bankers in the names of the trustees. The judgment creditor filed a bill to establish a charge against the money at the bankers representing the judgment debtor's share of past profits, by analogy to an attachment under the garnishee clauses of the Common Law Procedure Act. Lord Chancellor Hatherley, affirming a decision of the Master of the Rolls, Lord Romilly, held, that the bill could not be sustained. Lord Hatherley said that it was clear that the process (*i.e.*, that directed by the Common Law Procedure Act, 1854) was only adapted for the simple case of a debt due from a third person to the judgment debtor, where the judgment creditor could at once obtain payment of the debt. He also said that a further objection to the bill was, that it was quite clear that the moment the plaintiff could establish a charge upon the defendant's share in the profits, that instant the defendant's interest ceased.

2. Rails and other chattels which, by the terms of a contract, when placed on the land became the absolute property of the company, the contractor to have no property therein, except the right of using them on the land for the purpose of the works, except on completion of the line, as a condition precedent, and the plant being to be given to the contractor as part consideration, or, if used

(1) *Frieze v. Chapin*, 2 R. I. 429 38 L. J. (Ch.) 285; 20 L. T. (N. S.) (Amr.) 128; 17 W. R. 596.

(2) *Horsley v. Cox*, L. R. 4 Ch. 92;

by the company, to be paid for, were held not liable to be taken in execution for the company's debts (1).

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3. Where an injunction is issued after execution against the goods, the sheriff may proceed to sell, but the Court will in special cases stay the money in his hands (2).

4. Where A. executed a deed, by which he conveyed chattels to B. in trust, as to one moiety for certain scheduled creditors, as to the other for A.'s own benefit, and C., a creditor not in the schedule, sued A. and recovered, and took out execution against the chattels in the hands of B., and B. sued the sheriff's officer, and recovered at Law; upon a bill for an injunction, on the ground that the deed was void against creditors for the moiety, the Court refused the injunction, for there can be no execution against goods in the hands of a trustee (3).

5. It is held, in general, that the jurisdiction of Equity to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be cancelled a deed of the property (4); so that if a valid judgment at Law be iniquitously used, Equity will annul what has been improperly done under it (5). So Chancery will grant an injunction to prevent a party making use of a legal writ of execution for the purpose of vexation and injustice (6); or restrain the sale of property illegally taken in execution (7); or service of an execution issued too late (8); or an execution issued on a judgment the record of which has been destroyed, there being no renewal by substitution (9). An execution sale may be enjoined where it would cause a cloud on the title of the complainant (10); and this, although a sale of only the debtor's "right, title, and will." So, although in fact no title will pass thereby, the property not belonging to the execution defendant (11).

Equity will
relieve against
valid judgments
and
executions
used inequitably;

or where it
would cause a
cloud on complainant's
title.

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| (1) <i>Beeton v. Marriott</i> , 4 Giff. 436. | (7) <i>Kenyon v. Clarke</i> , 2 R. I. 67 |
| (2) <i>Hawkshaw v. Parkins</i> , 2 Sw. 539, 549. | (Amr.) |
| (3) <i>Cailland v. Estwick</i> , 2 Anstr. 381. | (8) <i>North v. Swing</i> , 24 Tex. 193 |
| (4) <i>Pixley v. Huggins</i> , 15 Cal. 127 (Amr.) | (Amr.) |
| (5) <i>Bissell v. Bozman</i> , 2 Dev. Ch. 160 (Amr.) | (9) <i>Cyrus v. Hicks</i> , 20 Tex. 483 |
| (6) <i>Colt v. Cornwell</i> , 2 Root, 109 (Amr.) | (Amr.) |
| | (10) <i>Key, &c., v. Munsell</i> , 19 Iowa, 305 (Amr.) |
| | (11) <i>Pixley v. Huggins</i> , 15 Cal. 127 (Amr.) |

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SECT. 15. *Grants.*

1. Whether a conveyance of land for the purpose of a railway being constructed thereon be voluntary or compulsory, every grant carries with it, in addition to the special protection afforded by the Railway Act in respect of workings within twenty yards distance of any masonry or building, all that is necessary to the enjoyment of the subject-matter of it; and a certain amount of lateral support being essential to the safety of the railway, that is a necessary incident of the grant. But the amount of support depends on the special circumstances of the locality: thus, if the railway crosses a river, then the abutments of the bridge will require a greater support than the other parts of the railway, and the conveyance will carry such support as an incident (1). And certain reservations of minerals contained in a Railway Act were—upon a bill by the railway company to restrain the removal of water or coal necessary for the stability of the bridge—held by the House of Lords not to vary the ordinary rule of Common Law as above stated (2). But in cases like the foregoing, it being impracticable to define beforehand the limits within which the workings ought to be restrained, an injunction is properly expressed in general terms against working so as to produce the particular evil apprehended (3).

2. At Common Law, where A. has two interests in the same hereditament, as houses or minerals, or a watercourse and also a mill, or two storeys in a house, and demises one part, *e.g.* the lower portion of a house, reserving to himself the upper part, the grantee either for years or in fee will not, except by express stipulation or very direct implication, be permitted to use the portion held by him so as to interfere with the enjoyment by the grantor of the portion of which he has retained possession (4).

SECT. 16. *Agreements not under Seal.*

1. Although a tenant in the occupation of premises under an agreement not under seal for a longer period than three years, is

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| (1) <i>Elliott v. North Eastern Ry. Co.</i> , | (3) <i>Ib.</i> |
| 8 L. T. (N. S.) 337; 32 L. J. (Ch.) 402. | (4) <i>Dugdale v. Robertson</i> , 3 K. & J. |
| (2) <i>Ib.</i> | 695; 3 Jur. (N. S.) 687. |

at Law only a tenant from year to year (being void at Law as a lease (1)), yet the agreement being enforceable in Equity as an agreement for a lease, he is entitled, as an "adjoining owner," to be served with a proper notice, required by the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), of the works proposed to be executed by the "building owner" (2), the provisions in the above Act of 1855 applying to equitable as well as legal owners; and an injunction, obtained *ex parte*, to restrain the defendants from pulling down a certain wall until a proper screen for the protection of the plaintiffs' property was erected, was made perpetual, with costs.

SECT. 17. *Settlements.*

1. Where C., who had filed a bill as a creditor to establish the validity of his security, in priority to a voluntary settlement executed by his debtor, sent to the trustees of the settlement a notice not to part with any of the funds in their hands, and the trustees replied, that unless certain proceedings were instituted within one month they should disregard the notice, and no proceedings were instituted within the time, and subsequently a bill was filed by the *cestui que trust* under the settlement, praying for an injunction to restrain C. from continuing the notice, the Court ordered that the trustees should be at liberty to deal with the income of the funds until further order, according to the trusts of the settlement (3).

Court will direct trust fund to be dealt with, notwithstanding notice not to do so, unless proceedings are taken.

2. Where A., having power to raise the portions provided for his younger children under his settlement by sale or mortgage, or other disposition of a reversionary term of 1000 years, in 1815, on the marriage of one of his daughters with Lord C., purported to charge by appointment this reversionary term with £4000 and interest; and after the death of Lord C., his personal representative, having been advised that the power to charge had not been duly executed, proceeded at Law against A. on the covenant of title;

(1) *Parker v. Taswell*, 2 De G. & J. 559; 8 & 9 Vict. c. 106, s. 3.

(3) *Lonergan v. Stourton*, 9 Jur. (N. S.) 1067; 11 W. R. 984; 9 L. T.

(2) *Cowen v. Phillips*, 9 Jur. (N. S.) 657; 11 W. R. 706.

(N. S.) 196.

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and A. gave judgment at Law, and filed his bill, stating that the sum would, in a Court of Equity, be decreed to be well charged, and praying a perpetual injunction against the proceedings at Law, offering, at the same time, to execute any instrument which should be deemed necessary for charging the same; the Court held, that A. should, with the trustees of the term, execute to the representatives of Lord C. a mortgage of the lands and premises in the term for £4000 and interest, and that a perpetual injunction should be granted against any further proceedings at Law (1).

Voluntary settlement, though a fair provision for wife, &c., is void against subsequent purchaser with notice;

3. In *Pulvertoft v. Pulvertoft* (2), Lord Chancellor Eldon held that a voluntary settlement was void under the 27 Eliz. c. 4, against a subsequent purchaser for valuable consideration with notice, though a fair provision for a wife and children, and refused an injunction restraining the husband from selling; but overruled a demurrer by the husband as covering too much, the plaintiff (the wife) being entitled, until an actual sale, to an execution of the trust; but when a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor (3).

and the volunteers have no equity against the purchase-money. Court (here) established a settlement destroyed by fraud.

4. Where, in 1860, a husband, through the intervention of his wife, obtained possession of their marriage settlement from the trustee; and the husband, in order to raise money upon the property comprised in it, destroyed the settlement, mortgaged part of the settled property, and was proceeding to sell other parts of it; and in 1864 the trustee filed a bill to restrain the intended sale, and prayed a declaration that the cancelled settlement should be established, and the trusts of it carried into effect; and the husband did not deny the fact of his having destroyed the settlement, but the trustee and the wife denied many of his allegations, especially those with respect both to the circumstances under which the settlement was obtained by her from the trustee, and the precise contents of it; and no draft or other copy of the settlement was produced to the Court, but there was the evidence of the trustee and the wife on the one side, and that of the husband and other persons who were not parties to the settlement, but who had sub-

(1) *Whaley v. Morgan*, 2 D & Wal. 330.

(2) 18 Ves. 84.

(3) *Daking v. Whimper*, 26 Beav. 568.

sequently read it, on the other, and there was also the evidence of the solicitor who had prepared the settlement, and who had acted as solicitor to the husband in the mortgage transactions, and in the proposed sale of part of the settled property; the Master of the Rolls (Lord Romilly) held, that upon a full consideration of all the evidence in the case, the trustee was entitled to the relief which he sought (1).

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5. Where A., before the marriage of his niece, verbally promised her and her intended husband that he would make a suitable provision for her, and also wrote a letter to his niece, which was not communicated to the intended husband, in which, referring to the assignment of a policy of assurance which he had effected on his life, he said: "J. urged me to make over the insurance, and get it done by an attorney, which would soon be published, but I will not, though I will do it in another way without publishing it, which is the only way it could be done safely; and I say that in confidence—do not mention it to any one;" and the husband swore that the marriage was had on the faith of the promise; and after the marriage a bond was given by A. to the husband, in pursuance of the promise, conditioned to pay a sum of money at the death of A., who afterwards assigned a policy by a voluntary deed, being at the time of the assignment, and at the time of his death, in solvent circumstances; the Court, upon a bill by the husband for a declaration that the assignment was fraudulent and void as against the plaintiff, and that the assurance company might be restrained paying over the policy-moneys to the assignees under the voluntary deed, held, that as neither the verbal promise nor the letter could have been enforced against A., the bond was voluntary, and gave no equity to set aside the assignment of the policy (2). The Master of the Rolls said, that the promise was much too vague to support the averment that the bond given after the marriage was given in pursuance either of an antenuptial agreement, or in fulfilment of a representation upon the faith of which the marriage had taken place; that the letter, which was never shewn to the plaintiff, could not be relied upon with any effect, even if the difficulty of want of mutuality were got over; and that

Bond (here) being voluntary, subsequent assignee of a policy under a voluntary deed, entitled to policy-moneys.

(1) *Brandon v. Barlow*, 13 L. T. (N. S.) 6.

(2) *M'Askie v. M'Cay*, Ir. Eq. Rep. 447; 16 W. R. 1187.

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he should hesitate, having regard to the opinions thrown out by the House of Lords in *Jorden v. Money* (1), to hold that any statement of future intentions falls at all within the doctrine of false representation; but that it was plain that such representation must, in order to give any equitable title, have some reasonable certainty, and that a mere vague statement, which neither determined the nature nor amount of the property to be affected, nor how it was to be dealt with, was the very opposite of certain.

SECT. 18. *Liens—Charges.*

Consignee of cargo chartering ship, by agreement with owner of cargo, has a lien on the proceeds of the cargo for advances properly made for enabling ship to fetch cargo.

1. If the consignee of a cargo, by agreement with the owner, charter a ship, and expend the money necessary and proper in order to enable her to fetch the cargo, he is, without any special agreement to that effect, entitled to a lien on the proceeds of such cargo in his hands for the advance so made; and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo, if he can arrest such proceeds before they come to the hands of the skipper of the cargo (2). And where the plaintiffs had chartered nine vessels in England to fetch C. D.'s timber from Nova Scotia, under an agreement between them that they (the plaintiffs) were to be the consignees, and C. D., in breach of the contract, consigned the cargoes and forwarded the bills of lading to other persons, but the plaintiffs arrested the produce of one of them in the hands of the consignee by means of an injunction; the Master of the Rolls, Sir J. Romilly, held that the plaintiffs could maintain a bill against C. D. and the consignee, to enforce their lien on any portion of the produce of that cargo, which could be identified *in specie*; and that such lien extended to all sums properly expended by them in respect of the nine ships, and to all pecuniary losses and liabilities, but not to commission, consignees' profits, or damages for breach of the contract (3).

Lien (here) for moneys advanced to

2. Where B. & Co. had agreed to build a ship for A., and to enable them to proceed with the work, and before the agreement

(1) 5 H. L. C. 185.

(2) *Young v. Neill*, 32 Beav. 529; 9 Jur. (N. S.) 976.

(3) *Ib.*

was signed, C. had advanced money on the understanding that he should have an assignment of the agreement and a lien upon the ship, but the agreement was cancelled; and B. & Co. then agreed to sell the vessel, which was in an unfinished state, to C., and that the sum of £500, then already advanced by the plaintiff to B. & Co., should be deemed and taken as part-payment of the purchase-money, and four days previously they had stopped payment, and shortly afterwards were made bankrupts; the Lords Justices, affirming a decision of Sir J. Stuart, held, that C. was entitled to a lien upon the ship for the £500 and interest, but not extending it to further advances (1).

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complete ship,
up to date of
agreement to
sell ship to
creditor.

3. Where the plaintiff had advanced to S., who was about to speculate in sugars, £10,999, on a verbal agreement that the plaintiff should have a lien on the sugars imported by S. from Mauritius and Batavia; and S. assigned his property to trustees for creditors before any sugars were bought in Batavia; upon a bill by the plaintiff praying a declaration that he had a lien for the sum on the cargoes of sugars sent to S. from Batavia, but omitting any mention of Mauritius sugars, and that the trustees might be restrained from parting with them or the proceeds, the Privy Council held, affirming a decree of the Supreme Court of New South Wales, that the plaintiff was precluded from afterwards insisting on any claim in respect of Mauritius sugars (2); and that it being no part of the contract that S. should invest the moneys lent in any particular mode, and S. having, in fact, assigned his property to trustees for his creditors before the purchase, the sugars assigned from Batavia were for the benefit of the trustees; and thus, S.'s money not being used in purchasing the sugar from Batavia, the plaintiff had no lien upon the sugars; and that the fact of S.'s trustees allowing S. to purchase Batavian sugar on their account did not affect them with any equities in favour of the plaintiff under his agreement with S.

4. Where the plaintiff, at the suggestion of the defendant, his father-in-law, removed from a shop which he had hired, into a house belonging to the defendant, and which the defendant

No lien on
premises for
moneys
expended in
repairs of a

(1) *Swainston v. Clay*, 11 W. R. 811; (N. S.) 92; 11 L. T. (N. S.) 97; 13 32 L. J. (Ch.) 503; 8 L. T. (N. S.) 563. W. R. 299.

(2) *Dean v. Byrnes*, 2 Moo. P. C. C.

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house in which
son-in-law
allowed to live
rent-free.

An officer in
the army may
create a lien
upon the sale-
moneys of his
commission.

promised to let him occupy rent-free, and no rent was paid for nineteen years, and the plaintiff expended about £300 upon the premises, almost wholly for repairs, and the plaintiff alleged that there was an absolute gift of the house to him; the Master of the Rolls, Sir J. Romilly, held, that the plaintiff was not entitled to any lien in respect of the £300. The Master of the Rolls said that when a father put his son-in-law in possession of a house and charged him no rent, there was an implied condition that the son-in-law should keep the premises in good repair (1).

5. Where D., formerly an officer in the army, had verbally agreed with M. and P. to repay a sum of money which he had borrowed, and for which they had become security, out of the moneys produced by the sale of his commission, if he should sell it; and D., in anticipation of selling out, requested C. & Co., his army agents, out of the proceeds of the sale when received by them to pay certain sums of money to parties in India, which they did; and subsequently to that date M. and P. gave the army agents notice of their agreement; Vice-Chancellor Sir J. Stuart restrained the latter from parting with the balance in their hands, the question of lien remaining for decision at the hearing of the cause; but the Vice-Chancellor said, that at all events, at this stage of the proceedings, he should consider the agreement for a lien established by evidence, and that such agreement did not contravene the policy of the law (2).

6. Where a firm of merchants at Hamburg, in June 1857, directed their correspondents, a firm of merchants in London, to purchase Mexican bonds, which passed by delivery upon certain terms, the bonds when purchased to be held at the disposal of the Hamburg firm; and on the 2nd of July the London firm wrote to announce that the bonds had been purchased, and enclosing the account of the transaction, the amount of which they would reimburse themselves on the following day; and on the 3rd of July the London firm wrote to apprise the Hamburg firm of bills drawn upon them for the amount, by which they "balanced the transaction;" and on the 4th of July the Hamburg firm wrote to state, that they would honour the drafts, advice of which they expected.

(1) *Millard v. Harvey*, 10 Jur. (N. S.) 1167; 13 W. R. 125. (2) *Marsh v. Peacocke*, 9 Jur. (N. S.) 789; 11 W. R. 277.

and requested the London firm in the meanwhile to keep the bonds in safe custody, and to give them the numbers of the same; and on the 6th of July the London firm wrote to state that until further order they would retain for safe custody the bonds, and giving the numbers of the bonds, and the bills were accepted by the Hamburg firm, and at maturity were paid; and on the 19th of November the Hamburg firm wrote to request that the bonds might be sent to them by post, but on the same day the London firm wrote to announce that they had stopped payment, but that the Mexican bonds lying with them were unjeopardized, and the Hamburg firm afterwards stopped payment:—on a bill by the representative of the Hamburg firm, praying that the defendants might be ordered to deliver up the bonds to the plaintiffs, and that in the meantime they might be restrained from selling or parting with them, Lord Chancellor Campbell held, reversing a decision of the Master of the Rolls, that the bonds were not subject to a lien for the general balance of account between the two firms (1).

7. Where some goods (wine) had been imported with counterfeited trade-marks, and the dock-warrants transferred to A., as a security for an advance made by him in ignorance of the fraud, the Master of the Rolls, Sir J. Romilly, held, upon a motion by the transferee A., *pro interesse suo*, that, notwithstanding an injunction restraining the dock company from parting with the wine, the defendants might be at liberty to permit him to withdraw the corks and substitute proper corks at his own expense, and thereupon, and on payment of their charges, to deliver the wine to him (all parties had consented to his making the application in this form, without filing a bill); that, subject to his causing the false trade-marks to be removed, his lien was prior to the costs of the plaintiffs in a suit instituted to restrain the dock company from parting with the goods; but as the transferee had been allowed to come in as if he had been a party, his Honour thought he ought to pay the costs of the motion (2).

8. The decision of Vice-Chancellor Sir L. Shadwell, recognising a lien on a brewer's lease for moneys advanced to complete the purchase, created by deposit with the brewers simultaneously with

Transferee without notice of dock-warrants of goods with counterfeited trade-marks, entitled to a lien prior to the costs of plaintiff's suit.

There is a lien upon a brewer's lease for moneys advanced to

(1) *Bock v. Gorrisen*, 30 L. J. (Ch.) 39; 29 L. J. (Ch.) 673.

(2) *Ponsardin v. Peto*, 12 W. R. 198.

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complete the purchase, created by deposit at the time of granting the lease.

the creation of the lease, for which the borrower (who was shortly after the deposit discovered to be an uncertificated bankrupt) had signed a memorandum expressing that he had deposited the deed for securing, by way of equitable mortgage, the payment of the money advanced, was affirmed by Lord Chancellor Cottenham; and an injunction granted to restrain an action by the assignees in bankruptcy of the borrower, brought by them against the brewers to recover a part of the purchase-money of the lease, was made perpetual by the Vice-Chancellor (1).

9. Where A., a merchant in Liverpool, being indebted to B., a merchant in London, on the 11th of April sent, at B.'s request, a written order to C., his agent in Bahia, to deliver to B.'s agent there all the goods belonging to A. in his (C.'s) hands; and on the 23rd of May, A. committed an act of bankruptcy, on which a commission issued, and on account of the distance of Bahia from England the order did not reach till after the 23rd of May; the Court held, upon a demurrer, that B. had a lien and a good title in Equity on the goods for his debt (2).

An agent carrying on, in his own name, the business of his principal, has a lien on the property of the concern to the extent of his liabilities.

10. Where a business, the property of A., was carried on with his capital and for his profit by B., his agent, in the name of the latter, at a fixed salary, and A. having become bankrupt, B. filed his bill, stating that by reason of the use of his name he had become liable to a heavy amount for the concern, which was solvent, notwithstanding the bankruptcy of A., and praying for an injunction to restrain the assignees from taking possession of or selling the business, or premises, or stock, and from collecting moneys due to the concern, or in any way intermeddling or interfering with the concern; Lord Lyndhurst, affirming a decision of Vice-Chancellor Sir L. Shadwell, held, that B. had a lien on the property of the concern to the extent of his liabilities, and granted the injunction (3).

11. Where a remainderman sold property to a purchaser, by whom money was advanced to pay off a heavy and pressing incumbrance, the remainderman representing himself as having a right to sell, with the concurrence of the tenant for life for that purpose:

(1) *Meux v. Smith*, 1 M. D. & De G. 396; 2 M. D. & De G. 789; 11 Sim. 410; 2 M. D. & De G. 315.

(2) *Burn v. Carvalho*, 7 Sim. 109; affirmed 4 My. & Cr. 690; S. C. 4 R. & Ad. 383.

(3) *Foxcraft v. Wood*, 4 Russ. 487.

and thereupon a draft of a conveyance was prepared, to which the tenants for life and remainderman were made parties, and the purchaser took possession; this gave the purchaser such an equitable title to the purchase as (having cleared the estate from a charge to which the tenant for life was liable) to establish a lien on the property, which Equity would protect by enjoining the tenant for life from proceeding by ejectment to obtain possession until the cause should be finally determined on the hearing, whatever case might be made by the answer on merits stated on the part of defendant in Equity (1).

12. An agreement that a certain judgment-debt and interest thereon should be paid to the plaintiff out of any moneys which might be recovered by the defendant in respect of certain claims which he had against third parties, was held, by Vice-Chancellor Sir W. P. Wood, to create a valid equitable charge upon these moneys when recovered; and the defendant having recovered the moneys so due to him in an action, and the same having been paid into the Court of Common Pleas, the Court of Chancery, in a suit by the judgment creditor to establish his equitable charge on the fund, granted an injunction to restrain the defendant from receiving it until he should have paid the judgment-debt, and interest, and the costs of the suit (2).

An agreement that a judgment debt and interest shall be paid out of moneys to be recovered upon certain claims against third parties, creates an equitable charge on the moneys when recovered.

13. Where C. had brought an action against F. in the Lord Mayor's Court for the recovery of a debt, and issued an attachment against B., who had in his hands funds belonging to F.; and W. filed a bill against C., B., and F., claiming a lien on the funds, and obtained an injunction *ex parte* to restrain proceedings in the action, and whilst the injunction was in force F. became bankrupt; the Court held, that though C. might, but for the injunction, have sued out execution long before F. became bankrupt, yet he was not entitled to be paid otherwise than rateably with the other creditors. The Vice-Chancellor, Sir L. Shadwell, said that his opinion was, that if the creditor was, in any manner, prevented from getting execution until the debtor became bankrupt, he was not entitled to be paid otherwise than rateably with the other creditors (3).

(1) *Ludlow v. Grayall*, 11 Price, 58.

(3) *Ullock v. Barber*, 6 Sim. 300 (v.

(2) *Riccard v. Prichard*, 1 K. & J.

the then Bankrupt Act, 6 Geo. 4, c. 16, s. 108).

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Bankers have no lien upon balance due upon separate account of one partner, for a balance due to the bank upon the joint account.

An order under s. 61 of 17 & 18 Vict. c. 26, attaching a fund in hands of garnishee, does not displace the prior lien of a solicitor who has given notice for his costs.

14. Where A. and B., traders, had a joint account at their bankers, and A. had also a separate account at the same bankers; and the bankers suspended payment, and at that time the joint account of A. and B. was indebted to the bankers, but the bankers were indebted to A. upon his separate account; and A. and B., in pursuance of an arrangement between themselves, gave a notice to the bankers, desiring them to transfer the money standing to the separate account of A. to the joint account of A. and B.; and the bankers omitted to comply with this order, and afterwards became bankrupt, and their assignees brought an action against A. and B. for the balance due to the bankers upon their joint account; and A. and B. filed a bill to restrain the proceedings at law: the Master of the Rolls, Lord Langdale, held, that the bankers, after a suspension of payment, could not transfer or set off one account against another; and that bankers have no lien upon the balance due upon the separate account of an individual partner for a balance due to the bank upon the joint account of the firm; and that A. and B. had no right to be relieved from the proceedings at Law, and the bill was dismissed with costs (1).

15. An order obtained under the 61st section of the 17 & 18 Vict. c. 26, attaching a fund in the hands of a garnishee to answer judgment-debt, will not displace the prior lien for costs of a solicitor who has given notice to the garnishee. And where B., a defendant in an action of A. v. B., was by an order of the Court made in a suit in Equity of B. v. A., instituted in aid of the defence at Law, ordered to pay £600 to A. and the solicitors to A. immediately served B. with notice that they claimed a lien for costs, and requested him not to part with the fund; and afterwards M., a judgment creditor of A., obtained a judge's order, notice of which he served on B.: Vice-Chancellor Sir W. P. Wood held—on a bill filed in Equity by the solicitors of A., praying for a declaration that the plaintiffs were entitled to a lien on the £600 for the amount of their costs and charges, for an injunction to restrain the garnishees from paying the money to the judgment creditor, and the judgment creditor from enforcing the judge's order, and for payment of their bill of costs—that their

(1) *Watts v. Christie*, 11 Beav. 546.

claim was preferable to that acquired by M. under the judge's order (1).

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16. Where a town agent of a country solicitor had received papers from him belonging to his client for the purpose of his client's business, the Court held that the country solicitor had a lien against the client for the amount of money due from him to the solicitor, and from the solicitor to the agent, on account of business done in that cause. And where a client, after the solicitor's bankruptcy, paid the agent his bill in order to obtain such papers, although an action had been commenced previously against him by the assignees for the bill due to the solicitor, the Court granted and continued an injunction to restrain the action, on the ground of the agent's lien (2).

A country solicitor has a lien upon the client's papers in agent's hands, for money due to solicitor, and from solicitor to agent, on account of business in a cause; and the town agent of a country solicitor has a lien upon papers for his costs.

SECT. 19. *Pensions.*

1. An assignment by a retired military officer of his pension for past services (with a power of attorney executed at the same time, enabling the assignees to receive it, and a covenant in the assignment by the officer not to receive the pension), for valuable consideration (in this case to secure payment of a debt and interest), is void under the 47 Geo. 3, sess. 2, c. 25, s. 4; and Vice-Chancellor Sir J. Stuart refused an injunction to restrain the officer from applying for or receiving the pension (3). But in *Davis v. The Duke of Marlborough* (4), Lord Chancellor Eldon said that a pension for past services might be aliened, but that a pension for supporting the grantee in the performance of future duties is inalienable. And in *Knight v. Bulkeley* (5), decided before *Lloyd v. Cheetham* (6), where the defendant, a retired officer in the army, having received a grant "until further order" from the Crown, of a pension for wounds and injuries received in the service, had

Assignment of pension for past services is good—for future duties bad.

An officer restrained intercepting the receipt of his pension for wounds, &c., assigned as security for an annuity.

(1) *Sympton v. Prothero*, 3 Jur. (N. S.) 711; 26 L. J. (Ch.) 671.

(3) *Lloyd v. Cheetham*, 3 Giff. 171; 9 W. R. 924.

(2) *Bray v. Hine*, 6 Price, 203 (*et v.* Beames on Costs in Equity, p. 214, 2nd Ed.)

(4) 1 Sw. 79.

(5) 5 Jur. (N. S.) 817; 4 Jur. (N. S.) 527; 27 L. J. (Ch.) 592.

(6) *Supra*.

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Pensions
granted by
Government
of India to
military per-
sons may be
assigned as
security for a
debt.

assigned the same to the plaintiff to secure the payment of a redeemable annuity granted to him by the defendant for valuable consideration, and had also executed a power of attorney in the form used at the War Office (namely, with a power of revocation by the grantor), empowering the defendant to receive the pension and pay himself the annuity; and the deed also contained covenants by the defendant to do all necessary acts to enable the plaintiff to receive the pension; and at the foot of the form of declaration issued by the Paymaster-General, to be filled up and signed by the grantee upon applying for payment of the quarterly instalment of the pension, were these words, "This allowance cannot be assigned as security for a loan of money;" but after two quarterly payments of the pension the defendant had, without notice to the plaintiff, revoked the power of attorney, by himself personally going to the War Office and receiving and appropriating the whole of the pension; and in 1858 an injunction had been granted to restrain the defendant from receiving the pension, and from executing any power of attorney authorizing or permitting any other person except the plaintiff to receive it: Vice-Chancellor Sir J. Stuart, on the application of the plaintiff, ordered the defendant to execute a proper power of attorney for the purpose of enabling the plaintiff to receive the pension, and made the injunction granted in 1858 perpetual against the defendant revoking the power or receiving the pension, or doing any act whereby the plaintiff's right to receive the pension might be intercepted; no receiver was appointed, and no order was made for costs. But in *Carew v. Cooper* (1), Vice-Chancellor Sir J. Stuart held that the 46 Geo. 3, c. 69, and 47 Geo. 3, sess. 2, c. 25, s. 4, do not apply to pensions granted by the Government of India to military persons employed in India for the purpose of the Indian Government: and that, therefore, an assignment by an officer in the service of the East India Company, who, under the Transfer Act of 1852 (21 & 22 Vict. c. 106) became a colonel in the Queen's Service, and retired on his pension of £450, and an annuity of £200 per annum, and afterwards assigned the same as security for a debt, was held by the same Vice-Chancellor to be valid. And an officer in the army may create a lien upon the sale-moneys of his

(1) 4 Giff. 619.

commission (1), and can assign the difference received by him upon retiring on half-pay (2).

2. In *Lloyd v. Eagle* (3), where the defendant, a retired store-keeper of the Ordnance Department of one of Her Majesty's dock-yards, being entitled to payment from the Treasury of a pension or superannuation allowance of £155 a year, had assigned such pension to the plaintiffs, the trustees of an insurance company, to secure a loan of money, and default being made in payment, an application was made by the trustees to the Paymaster-General, who refused to make any payment to them; and afterwards the defendant became insolvent, and included the debt due upon the plaintiff's security in his schedule; and the Commissioner of the Insolvent Debtors Court, by his order, made in presence of counsel for the plaintiff, recommended that £50 a year, part of the insolvent's pension, should be paid by the Paymaster-General to the provisional assignee of the Insolvent Debtors Court, for the benefit of the creditors of the insolvent; and the plaintiff declined to prove as creditor under the insolvency, but, having filed a bill, moved for and obtained an injunction to restrain the defendant from applying for, or receiving, or enabling any other person to receive, the balance of his pension left after the appropriation of the annual sum recommended by the Commissioner; the Vice-Chancellor, Sir J. Stuart, observing, that the defendant could not be allowed to violate the contract made by him with the plaintiffs. And in *Tunstall v. Boothby* (4), where the Commissioners of Customs, by the direction of the Lords of the Treasury, had granted to A., as a compensation for the loss of an office which he had held in the Custom-house, £500 a year, payable quarterly by the Receiver-General of Customs; and A. assigned the allowance to B. for a valuable consideration, and subsequently took the benefit of the Insolvent Debtors Act; the Court (Vice-Chancellor Sir L. Shadwell and Lord Chancellor Cottenham), in a suit by B. against A. and the assignees of his estate, but to which neither the Lords of the

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Retired store-keeper restrained receiving balance of pension after a provision for his creditors in insolvency.

(1) *Marsh v. Peacocke*, 9 Jur. (N. S.) 789; 11 W. R. 277; *et v. ante*, "Liens, &c." pl. 5, p. 560.

(2) *Price v. Lovett*, 20 L. J. (N. S.) 270; 15 Jur. 786.

(3) 5 Jur. (N. S.) 187; 28 L. J.

(Ch.) 389.

(4) 10 Sim. 542; *et v.* 7 Geo. 4, c. 57, ss. 29, 30 (An Act for the Relief of Insolvent Debtors); 1 & 2 Vict. c. 110, ss. 56, 57.

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Treasury nor the Commissioners of Customs were parties, restrained the Receiver-General from paying over to the defendants moneys in his hands on account of the arrears of the allowance, unless the Lords of the Treasury or the Commissioners of Customs should order the contrary; and, *semble*, that such compensation allowance, though revocable at the pleasure of the Government, is assignable.

The income of a canonry of Windsor may be restrained in favour of a grantee of the profits as a security, the duties not being connected with the public service.

3. Where a canon of Windsor had granted the canonry and the profits, &c., to the plaintiffs, to secure a sum of money, and, so far as it appeared on an interlocutory application, the estates were vested in the corporation, and the canon was entitled to an aliquot share of the profits; and there was no cure of souls, and the only duties were residence within the Castle, and attendance in the chapel twenty-one days a year; and the defendant (the canon, Mr. M.) having made default in the payment of the interest and in keeping up the policies, the plaintiff filed his bill for the purpose of obtaining payment, and for an injunction to restrain the dean and canons from paying, and the defendant M. from receiving, the income of the canonry, and for the appointment of a receiver; the Master of the Rolls (Lord Langdale) held, upon this state of circumstances, that the security was valid, and a receiver of the profits was appointed. Lord Langdale, in his judgment, said that if it had been made out that the duty to be performed by the canon was a public duty, or in any way connected with the public service, he should have thought it right to attend very seriously to that argument, because there were various cases in which public duties were concerned, in which it might be against public policy that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public was interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them; and that such was the reason in the cases of half-pay, where there was a sort of retainer, and where the payments which were made to officers from time to time were the means by which they, being liable to be called into public service, were enabled to keep themselves in a state of preparation for performing their duties; and that if, therefore, they were permitted to deprive themselves of their half-pay, they might be rendered

unable promptly to enter upon their duties when called upon, and the public service would be thereby greatly injured; so also, that where a pension or remuneration was given for a purpose which tended less directly to the public benefit, as, for instance, was the case in *Davis v. The Duke of Marlborough* (1); that there the pension was given to the Duke of Marlborough as a memento of the gratitude of the nation, and as a reward for his distinguished public services; and that it was there the intention of the legislature that it should be kept in mind that it was for those great services it was given; that in that case the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services, would be entirely lost; and that so in the course of that case Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office; that if in this case the residence in Windsor Castle and the attendance on Divine Service had been stated in the answer, or in any way shewn to be for the benefit of the public, or for the maintenance of the dignity of the Sovereign for the benefit of the public, he should have thought the case worthy of a very different consideration; but that, from all which was stated in the answer, that was not the case; that it was a service to be performed for the benefit of the party himself, and therefore, upon the case as it then stood upon the answer, and without saying there might not be other facts which might be material to be ultimately considered, it appeared to him that the security of the plaintiffs was valid, and that he must therefore refuse the motion to discharge the order for an injunction and a receiver with costs (2).

(1) 1 Sw. 74.

(2) *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 544.

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SECT. 20. *Stoppage in transitu.*

1. In *Straker v. Ewing* (1) the Master of the Rolls (Sir J. Romilly) held, that stoppage *in transitu* is an ordinary legal right, as to which a Court of Equity, unless by reason of some unusual circumstances, will not interfere. And where the plaintiffs sold some coals to the defendant, and shipped them for exportation, and a bill of lading was made out and delivered to the vendee's agent, and the vendee bought the goods, in fact, as agent of C.; and the plaintiffs, not having received payment, instituted a suit for an injunction to restrain the vendee's agent from parting with the bill of lading; and they supported their equity by allegations of gross fraud—namely, by alleging that the vendee was insolvent, and that the mode of obtaining the goods was a fraudulent contrivance, by which C. was to obtain satisfaction of a debt owing to him by the vendee; but there was no proof of fraud; the bill was dismissed with costs, the plaintiffs' remedy being by action against the purchaser for the price; the Master of the Rolls observing that the Court had always visited, and always would visit, a charge of fraud unproved severely; and if the rule was to be more stringent in one case than another, it was when the interposition of the Court was rested on the alleged fraud; and that, even if this had been a case of stoppage *in transitu*, the remedy would have been at Law, and the Court could not have interfered unless there had been some unusual circumstance which called for its interference; and that, hence, the charge of fraud became necessary to sustain the bill (2). But in *Schotsmans v. Lancashire and Yorkshire Railway Company* (3), it was held that a bill in Equity will lie to enforce a right of stoppage *in transitu*, and that it is a proper subject for a bill in Equity. In this case, upon a bill praying, first, that the plaintiffs, or the plaintiff Schotsmans, might be declared entitled to have certain goods and flour delivered up to them or him; or that, if not so entitled, the plaintiff Schotsmans might be declared entitled to a lien on the flour for the payment of the purchase-money, and that, in the meantime, the defendants

The enforcing of a right of stoppage *in transitu* is a proper subject for a bill in Equity.

(1) 34 Beav. 147; 13 W. R. 286.

(2) *Ib.*

(3) L. R. 2 Ch. 332; L. R. 1 Eq. 349; 14 W. R. 270; 12 Jur. (N. S.) 42.

might be restrained from removing or parting with the flour; and that, if any part of the flour had been removed out of the control of the defendants, directions might be given for assessing the damages in consequence thereof; the Master of the Rolls (Lord Romilly) held, that where goods have been contracted to be sold to one, delivery of such goods by the vendor on board a ship ostensibly belonging to a firm of which the vendee is a member, and of which ship he is sole registered owner, is not a delivery of such goods to the vendee so as to exclude the vendor's right of stoppage *in transitu* before the delivery of the goods at the port of consignment (here Goole), if such ship is a general ship or trader, and takes up the goods in course of one of its regular trips, even though the bills of lading signed by the captain for such goods should be made in favour of the vendee and his assigns, and one of such bills should be retained by the captain. But the Lord Chancellor (Lord Chelmsford) and Lord Justice Cairns held, reversing the decision of the Master of the Rolls, that the delivery on board the purchaser's ship was delivery to the purchaser, so as to preclude stoppage *in transitu* before the delivery of the goods at the port of consignment.

2. Where Witt, a merchant at Bahia, shipped at Bahia a cargo of sugar by the order and at the risk of B., a sugar-refining company of Glasgow, in a ship chartered by Witt; and the charterparty provided that the ship should proceed "either direct, or *via* Falmouth, Cowes, or Queenstown, for orders to a port in the United Kingdom, or to a port on the Continent (between certain limits), and deliver the cargo in conformity with the bill of lading;" and the bill of lading stated that the ship was "bound for Falmouth, Cowes, or Queenstown for orders," and that the cargo was to be delivered "unto order or its assigns; and Witt sent to B. the charterparty, the bills of lading, indorsed to B. or order, and the invoice (which stated that the cargo was shipped "for the account and risk of B., for Falmouth, Cowes, or Queenstown, for orders and a market;") and the ship arrived at Falmouth, and the master, in pursuance of written instructions from Witt, announced its arrival to Witt's agents in London, and asked them for orders, and the agents applied to B. for instructions as to the destination of the ship; but before any instructions were given, B. became

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insolvent, and thereupon Witt's agents stopped the cargo; and the plaintiff, the assignee of the property of the company B., for the benefit of the creditors of the company B., instituted a suit against Witt and the master of the ship, for a declaration that he was entitled to the cargo, and for an injunction to restrain the defendants from discharging it, except at such place as he should direct, and from selling or disposing of it; the Master of the Rolls (Lord Romilly) held, that the cargo had not been constructively delivered to B., that the *transitus* was not over, and that the stoppage was valid (1).

The *transitus* of goods is not ended by delivery on board.
Stoppage in *transitu* only extends to the goods and net proceeds of sale.

3. The *transitus* of goods is not ended by delivery on board a ship chartered by the vendee. The right of stoppage in *transitu* extends only over the goods themselves and the net proceeds of the sale thereof, and not over the policy-moneys paid in respect of insurances effected by the vendee. And where a merchant in Sweden contracted to sell timber to B., in England, and B. chartered a ship to fetch the timber, and insured it, and the timber was damaged during the voyage, and before it arrived in England B. had failed, and the merchant in Sweden thereupon gave notice to the captain of the ship to stop the timber; it was held, by Lord Chancellor Cairns, affirming on this point a decree of Vice-Chancellor Sir W. P. Wood, that the merchant in Sweden was entitled, as against the other creditors of B., to the proceeds of the sale of the timber—but varying the decree as to this point, that he was not entitled to money which had been paid for the damage under the policy of assurance (2).

4. Where goods (a cargo of linseed) were shipped by A., a firm at Calcutta, to the order of B., in this country, and B. pledged the bill of lading to C., and afterwards became bankrupt; and on the arrival in the Thames of the ship in which the goods were, C. obtained from the brokers, on payment of the freight, an overside order for the delivery of the goods, and on presenting this order to the chief officer on board the ship, the lighterman employed by C. to bring away the goods was told that he should have them as soon as they could be got at; and in the meantime, before the ship

(1) *Fraser v. Witt*, L. R. 7 Eq. 64; (Ch.) 665; L. R. 3 Ch. 588; 16 W. R. 17 W. R. 92; 19 L. T. (N.S.) 440. 1025; 19 L. T. (N.S.) 40; L. R. 4 Eq.

(2) *Berndtson v. Strang*, 37 L. J. 481; *v. ante*, pl. 32, p. 413.

broke bulk, A., by their agents in this country, served notice upon the captain and agents of the ship to stop the delivery of the goods to any person other than themselves: Vice-Chancellor Sir W. P. Wood held—on a petition by A., the consignors of the cargo from Calcutta, and their agents in this country, for the purpose of obtaining payment of the surplus proceeds of the cargo (then standing in Court), after satisfaction of the claim which was established by the decree made at the hearing of the cause (1) in favour of the plaintiffs, the mortgagees of the bill of lading—that by the mere promise to deliver them to C. when they could be got at, the goods were not brought into the actual or constructive possession of B., so as to prevent A., the unpaid vendor, from exercising his right of stoppage *in transitu*; and, accordingly, that A. was entitled, as against the assignees in bankruptcy of B., to the surplus proceeds of the goods, after satisfying the charge of C. (2). The question in deciding upon the consignor's right of stoppage *in transitu* is, not whether the voyage is at an end, but whether the goods are at home, actually or constructively, in the possession of the vendee (3).

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In deciding upon consignor's right of stoppage *in transitu*, the question is, whether the goods are at home, actually or constructively, in the possession of the vendee.

SECT. 21. Notice.

1. Where property, either immoveable or moveable, is disposed of, with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise (4). Lord Justice Knight Bruce, in this case, laid down the principle thus: "It may be stated, at least as a general rule, that where a man by gift or purchase acquires property from another, with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use and

As a general rule, an acquirer of property with knowledge of a previous contract for valuable consideration made by the donor or vendor with a

(1) *Coventry v. Gladstone*, L. R. 4 Eq. 493; *v. ante*, p. 420, pl. 45.

(2) *Coventry v. Gladstone*, L. R. 6 Eq. 44; 37 L. J. (Ch.) 492·16 W. R. 837.

(3) *Ib.*

(4) *De Mattos v. Gibson*, 4 De G. & J. 276, 282; 28 L. J. (Ch.) 165, 498.

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third person,
will not be
allowed to use
that property
in a manner
not allowable
to the giver or
seller.

Assignee of
underlease
with construc-
tive notice of
covenant in
the assign-
ment of the
original lease
restrained
from com-
mitting
breach.

employ the property in a manner not allowable to the giver or seller." And, accordingly, in this case, the mortgagee of a ship, and in the case of *The Messageries Impériales v. Baines* (1), the purchasers of a ship, each with notice of a charterparty previously entered into, were respectively restrained until the hearing of the cause from doing any act which would have the effect of interfering with the due performance of the charterparty; but upon the hearing of the cause Vice-Chancellor Sir W. P. Wood dismissed the bill; and, on appeal, this decision was affirmed, the Lord Chancellor considering that specific performance of the charterparty could not be decreed, the highest right against the mortgagee being to prevent him from actively interfering to stop the performance of the contract while the contract remained in force: but that, under the circumstances of the case, the contract was virtually at an end upon the mortgagee taking possession of the ship (2). In *Clements v. Welles* (3), upon a bill by the assignor of the original lease against the assignee of the original lease and the assignee of an underlease, for specific performance of a covenant in the original lease not to carry on the business of a hairdresser on the premises, and to restrain the assignee of the underlease from carrying on the business there, the Master of the Rolls (Lord Romilly) held, that the assignee of the underlease had constructive notice of the covenant in restraint of trade contained in the assignment of the original lease, he having precluded himself, by agreement, from examining the prior title, and restrained by a perpetual injunction the committing a breach of it.

SECT. 22. *Acquiescence—Delay—Laches.*

A party build-
ing on
another's land
with his know-
ledge, and
without
objection,
cannot be
ousted.

1. If a man stands by and allows another to erect a building on his ground, and he afterwards agrees as to the rent to be paid for it, neither the owner of the land, nor any person claiming under him, can dispute the right of the builder to use the land (4). And

(1) 11 W. R. 322.

(2) *De Mattos v. Gibson*, 28 L. J. (Ch.) 165, 498; 4 De G. & J. 276, 282.

(3) 35 Beav. 513; L. R. 1 Eq. 200;

35 L. J. (Ch.) 265; *v. ante*, p. 93.

(4) *Mold v. Wheatcroft*, 27 Beav. 510.

so in *The East India Company v. Vincent* (1), Lord Chancellor Hardwicke said that there were several instances where a man had suffered another to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conscious of his right, and the person building had no notice of the other's right, in which the Court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance; but that these cases had never been extended so far as where parties have treated upon an agreement for building, and the owner had not come to an absolute agreement; that there, if persons will build notwithstanding, they must take the consequence, and that this was not such an acquiescence on the part of the owner as would prevent him from insisting on his right. And where a person in pecuniary difficulties entered into a composition deed, by which he covenanted to pay £1500 to trustees, and effect an insurance on his own life for that amount, and he paid £500 and then effected an insurance for £1000 only; and one of the creditors who had signed the deed brought an action against the debtor for his debt, insisting that the deed was void in consequence of the breach of covenant to insure for £1500; but it being shewn that the creditor was aware of the amount of the insurance soon after it was effected, and his conduct being considered by the Court as shewing acquiescence in such breach of covenant, he was held not to be entitled to take advantage of it, and was restrained by a perpetual injunction from bringing any action against the debtor (2). And where the heir-at-law had long acquiesced, and also acted as a devisee in trust under the will, he was held to have lost his right to an issue *devisavit vel non*; and he was refused an issue to try the question of parcel or no parcel, the Court being satisfied upon the evidence that the whole passed; and, having misconducted his defence, was ordered to pay all costs of the suit up to the hearing (3).

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But the doctrine not extended to cases where a treaty was in negotiation for building.

Creditor bringing an action on ground of a breach of covenant to insure for a given amount, restrained, having been aware of an insurance for less, and conduct amounting to acquiescence.

Heir having acquiesced and acted as devisee in trust, no right to an issue *devisavit*, &c.

2. In *Elliot v. Merriman* (4), where there was a devise of all the real and personal estate charged with the payment of debts, and for sixteen years the plaintiffs (bond creditors) never asked for their

(1) 2 Atk. 83.

(3) *Man v. Ricketts*, 7 Beav. 93.

(2) *Watts v. Hyde*, 17 L. J. (N.S.) (Ch.) 409; 12 Jur. 661.

(4) 2 Atk. 41; S. C., Bar. 78.

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Acquiescence for six years in bond fraudulently obtained by party in fiduciary situation, held to disentitle an executor to restrain proceedings thereon.

Party acquiescing in a nuisance restrained bringing action.

principal, but received their interest regularly, during which time there were several sales of the testator's estates, the Master of the Rolls dismissed a bill brought by the bond creditors, and held that the purchaser should not be disturbed after quiet possession of sixteen years. And in *Walmesley v. Booth* (1), where a party acquiesced for six years in a bond fraudulently obtained by a party in a fiduciary situation, Lord Chancellor Hardwicke held that his executor could not be relieved against the bond, and dissolved an injunction obtained to stay proceedings at Law. And where the several owners of lands in the parish of C. had entered into an agreement that a particular common should be enjoyed as a cow-pasture for ninety nine years, and this agreement was signed by the bailiff of one of the owners "so far as he had power"—though no particular authority could be shewn, yet after an acquiescence of above thirty years on the part of this owner, an authority will be presumed, and he will be bound by the act of his servant (2). And where a party allows and acquiesces in erecting a nuisance, he will be stayed in an action at Law (3). In *Lord Guernsey v. Rodbridges* (4), where an encroachment of a watercourse had been made in the infancy of the ancestor, who had acquiesced for twenty-one years after he became of age, the Court would not afterwards notice his complaint.

3. Where the Court summarily interferes against the legal possession, it has a right to expect a plaintiff to proceed with the most complete and honest diligence to obtain a decree; and delay in his proceedings constitutes an objection to the proposed interference (5).

4. Where a bill had been filed by a company for smelting and manufacturing iron, against proprietors of coal-mines adjoining their works, for specific performance of an agreement to sell to the company, at a fixed price per ton, all of certain beds of coal, estimated to contain from 120,000 to 150,000 tons, to be raised and delivered by the defendants at the rate of 500 tons per week, and the company to drain the beds; and for an injunction to restrain the defendants from selling any part to other persons; and the bill averred that the coal was very conveniently situate with

(1) 2 Atk. 25; S. C., Bar. 475.

(2) *Tufton v. Wentworth*, 1 Bro. P. C.

165.

(3) 2 Eq. Ab. 522.

(4) Gilb. Eq. Reps. 3.

(5) *Owen v. Homan*, 4 H. L. C. 997.

reference to the company's ironworks, which adjoined thereto, and that the company had the power, by means of their engines and pits, to drain the beds, and had occasion for a large quantity of coal of that particular description: Vice-Chancellor Sir W. P. Wood allowed a demurrer, mainly on the ground of laches, the company having neglected to file their bill until eleven months after they discovered the defendants had ceased to deliver the coal, and were referred by defendants to their solicitors; the Vice-Chancellor observing that it was so serious an objection, that it would be impossible for the Court to perform the contract; and that in contracts relating to commodities fluctuating from day to day in market price, the Court expects persons to become unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after such an interval, and when the parties may be no longer in the same position, and such a contract is a positive contract, and does not give jurisdiction to restrain a sale to other parties (1); and the Court refused leave to amend, and account for laches, on the ground that the agreement— notwithstanding it was to be performed, not immediately, but by instalments, and at intervals extending over a long period, and notwithstanding the circumstances averred as to the vicinity of the coal and its convenience with reference to the company's works, and the importance to them of coal of that particular description— was an agreement the works of which the Court could not undertake the superintendence; for the application to the Court would be incessant to secure due industry and exertion on the part as well of plaintiffs as defendants; and, *semble*, upon this ground alone the demurrer would have been allowed. And the Vice-Chancellor said he apprehended that, as to the averment of the benefit to be derived from the vicinity of the defendants' coal to the company's ironworks, that could be estimated by damages, and taken alone was not a ground for specific performance.

5. In *Davie v. Beardsham* (2), where the plaintiff, devisee of A., asking it for granted that certain copyhold premises contracted for by A., but not surrendered until after making his will, did not pass hereby, allowed the defendant to enter and hold the same for

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Laches (here)
by not filing
bill eleven
months after
discovery of
breach of
agreement to
deliver coals.

(1) *Pollard v. Clayton*, 1 K. & J. 462.

(2) 1 Ch. C. 39.

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Bill of interpleader ought to be filed immediately after or before commencement of proceedings at Law.

twenty years, the plaintiff paying his rent as tenant for that time; the Court held that if the plaintiff had come in time, he would have been relieved, notwithstanding his acquiescence in the defendant's title.

6. A bill of interpleader ought to be filed immediately after or before the commencement of proceedings at Law, and not to be delayed till after a judgment or verdict has been obtained; and therefore, where an interpleading bill was filed after a verdict had been obtained by one of the parties, and an injunction had been granted on the money being paid into Court, the Court dissolved the injunction, though the answer of only one of the parties had come in, the plaintiff not satisfactorily accounting for the delay in filing his bill (1).

7. Where the original bill being for an account, and an injunction to restrain an action, and the injunction being dissolved on the merits nearly ten years after the bill was filed, and the plaintiff filed a supplemental bill for a discovery, and commission to examine witnesses in aid of his defence to an action substantially the same, the motion for the commission was refused, with costs, on the ground of delay (2).

8. Where A. conveyed or assigned his interest in lands to B., in consideration, among other things, that B. should make or give a lease back again to A. of a half or portion of the lands; and in consideration also of a loan of £200 by B. to A.; and B. covenanted to execute the lease accordingly, subject to the repayment of £200 for which B. had a judgment; and no lease was actually made, but A. remained in possession of his portion upon his equitable title; and B. lent further sums of money to A., and obtained judgments for these sums, and then conveyed the land and assigned the judgments to C.; and C. issued writs of *fi. fa.* on the judgments, and in 1781 procured a sale by the sheriff of A.'s equitable interest; and on ejectment brought on the demises of the purchaser and of C. A. was turned out of possession; and A., in 1782, filed his bill for relief and execution of a lease to him according to the agreement, but, from embarrassment in his circumstances, did not further prosecute the suit till 1801, and no steps were taken between 1782 and 1801 to dismiss the bill; but in 1808 the bill was dismissed

(1) *Cornish v. Tanner*, 1 Y. & J. 333.

(2) *Todd v. Aylwin*, 1 Sim. 271

in the Court below, yet the House of Lords reversed this decree, and decreed specific performance (1).

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9. Where, in 1799, Lord Donegal, being tenant for life of estates in Ireland, conveyed them to trustees for ninety-nine years, upon trust to pay him an annuity of £10,000 a year, and to apply the surplus in payment of his debts; and in 1802 a creditor filed a bill in England, against the trustees and Lord Donegal, to carry the trusts of that deed into execution, and a decree was made against the trustees for an account, and a receiver appointed, but Lord Donegal, who was out of the jurisdiction, in Ireland, continued nevertheless in possession of the rents; and in 1807 he came to England, and a supplemental bill was filed against him, upon which an injunction was granted restraining him from receiving the rents; and afterwards the decree in the original cause was pronounced as against him, and the injunction and receiver continued by the decree; but no proceedings were taken to give effect to this decree till 1836, and Lord Donegal continued in possession until 1819, when he granted, for valuable consideration, certain annuities chargeable upon his annuity of £10,000; and in 1828 the creditors claiming under the original deed filed a bill in Ireland to obtain the benefit of the decree made in the English suit; and in 1835 obtained a decree for payment, and an account, upon the footing of the original decree; and very shortly after such decree of 1835 the assignees of the derivative annuities filed a bill in Ireland to enforce their claim under the derivative annuities granted in 1819, to which bill they made the plaintiffs in the other suits defendants, who, by their answer, claimed a lien upon the £10,000 to make good the surplus of the rents and charges which Lord Donegal had received in contravention of the trust-deed of 1799, and they filed a supplemental bill to establish that claim:—the House of Lords held, on appeal, affirming the judgment of the Court below, that such creditors had forfeited by their laches whatever equity they had to have the £10,000 applied in making good the surplus rents and profits received by Lord Donegal; which equity, it was observed by the Court, would not, apart from the laches, have extended later than 1819, so as to prejudice the rights of those who then

(1) *Moore v. Blake*, 4 Dow, 230; 1 B. & B. 62.

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A continual claim, or mere assertion of claim, without active steps, will not keep alive a right.

There must be no improper or unreasonable delay or laches in the enforcement of rights.

Acquiescence, though it does not confer a right on opposite party, deprives complainant of right to assistance of Equity.

became purchasers of the original annuity, to the extent of their derivative annuities (1).

10. A continual claim, without any active steps in support of it, will not keep alive a right which would otherwise be barred by laches (2); and Lord Justice Turner, in *Clegg v. Edmondson* (3), said that he could not agree to a doctrine so dangerous as that the mere assertion of a claim, unaccompanied by any act to give effect to it, could avail to keep alive a right which would otherwise be precluded.

11. To entitle the plaintiff to an injunction, he must not be guilty of any improper delay in applying for relief (4): "If a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief; more especially where a party, being cognisant of his rights, does not take those steps to assert them which are open to him, but lies by, and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character" (5). Acquiescence, although not conferring a right on the opposite party, deprives the complainant of his right to the interference of a Court of Equity. Unless the applicant has acted promptly, he is held to have impliedly authorized what he now objects to (6).

SECT. 23. *Fraud—Deceit.*

1. Where the defendant became acquainted with the fact that, under the will of a relation of the plaintiff, an estate vested in trustees was settled (after a subsisting life estate, and upon the failure of issue of the tenant for life, who had then no issue) to the plaintiff for life, with remainder to his issue in tail, with remainder over, and an ultimate remainder to the plaintiff's brother (then

(1) *Houlditch v. Wallace*, 5 Cl. & F. 629; 1 D. & Wal. 490; affirming *Wallace v. Donegal* (*Marquis of*), 1 D. & Wal. 461; *et v. Houlditch v. Donegal* (*Lord*), 8 Bli. 340.

(2) *Lehmann v. McArthur*, L. R. 3 Ch. 496.

(3) 8 De G. M. & G. 787, 810.

(4) *Grey v. Ohio, &c.*, 1 Grant, 412; *Burden v. Stein*, 27 Ala. 104; *Long v. Cross*, 5 Jones, Eq. 323; *Whitney v. Union, &c.*, 11 Gray, 359 (Amr.)

(5) *Per Bigelow, J., Tash v. Adams*, 10 Cush. 253 (Amr.)

(6) *Binney's Case*, 2 Bland. 92 (Amr.)

deceased) and his heirs and assigns; and the defendant having communicated to the plaintiff (who was then supposed to be, and was in fact, the heir-at-law of his brother) the existence of such a will; in a long correspondence produced an impression on the mind of the plaintiff, contrary to the facts, that the plaintiff's interests under the will were precarious, that they were endangered by the conduct of the trustees and tenant for life, and could not be established without difficulty, delay, and litigation; and the defendant obtained a conveyance of a moiety of the estate from the plaintiff, the defendant indemnifying the plaintiff against the costs of recovering the property: the Court, upon a bill to restrain interference with the property, set aside the conveyance and granted an injunction, and held, that it was not an objection to this relief that the plaintiff had throughout the means equally with the defendant of knowing what his rights were, and of obtaining competent advice respecting them (1). And where a conveyance of a moiety of an estate was made by the plaintiff to the defendant, upon a representation, first made to the plaintiff, by the defendant, that such moiety was to be the remuneration of the lawyer for recovering the estate, and upon a subsequent representation that such moiety had been made over to him (the defendant), the circumstance that such representations, as to the remuneration for professional services, and as to the transfer to the defendant, were untrue was held to be a ground for setting aside the conveyance. Lord Justice Lord Cranworth, on the re-hearing, said, that it might be impossible to give a definition of what constitutes fraud in the contemplation of a Court of Equity, so as to meet all the various combinations of circumstances to which that word may apply; but that there could be no difficulty in saying, that whenever any one has by wilful misrepresentation induced another to part with his rights, in the belief that such representations were true, this is in the plainest and most obvious sense a fraud, which this Court will not tolerate; and, after an examination of the letters and documents in evidence, his Lordship added: "I have thus arrived at the conviction that, in three distinct respects, Captain S. misled Sir T. R. in the treaty which ultimately led to the execution of the deed of conveyance of the

Plaintiff is entitled to be relieved against fraudulent misrepresentations, though he may have had the same means as defendant of knowing his rights.

Whenever any one by wilful misrepresentation induces another to part with his rights, this is a fraud against which the Court will relieve.

(1) *Reynell v. Sprye*, *Sprye v. Reynell*, 8 Hare, 222; affirmed, 1 De G. M. & G. 660, 691; 21 L. J. (Ch.) 633.

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15th July, 1843: first, by representing to him that the proposal to share the property was one usual among men of character, and one on which Mr. Y. (the solicitor of Captain S.) had proposed to act; secondly, by leading him to believe that the benefits to be obtained for him or his heir could only be so obtained, if at all, through the medium of a doubtful and costly litigation; and, thirdly, by not explaining to him, after Mr. S.'s opinion had been obtained, that his interest was not contingent, as he had originally described it, but an absolute indefeasible interest, subject only to the chance of Mrs. W. R. leaving issue" (1).

2. Where A. made an absolute conveyance of land to B. and his heirs, in consideration of £1500, which was at that time the full value, but on the next day B. executed a defeasance, declaring that if A. or his heirs should, within sixteen years, pay B. the £1500, the conveyance should be void; and B. entered and enjoyed the lands, and about three years afterwards made a settlement thereof upon his marriage, to which settlement A. was privy, but took no notice of the defeasance, or ever attempted to refute the general opinion that B. was the sole and absolute owner of the lands; and after B.'s death A. set up the defeasance, and filed a bill to redeem, to which the son and heir of B. pleaded the purchase-deeds and marriage settlement of his father: the Court held, that the intent of the conveyance being to enable B. to obtain a marriage settlement and a considerable portion, such intention was fraudulent, and therefore a perpetual injunction was awarded against A. to stop all further proceedings under the defeasance (2).

3. Where A., an attorney, had prevailed on B., a young man about to be admitted, to become his partner in business for a certain term, and to pay him as a consideration a considerable sum of money—part to be paid on the execution of the articles, and the remainder by instalments; and A. sued out, in the character of petitioning creditor, a commission of bankruptcy against and made B. a bankrupt, whereby the partnership was dissolved: A. was restrained from proceeding for the instalment, and ordered to refund what was already received, except so far as was commen-

(1) *Reynell v. Sprye*, *Sprye v. Reynell*, 8 Hare, 222; affirmed, 1 D. M. & G. 660, 691; 21 L. J. (Ch.) 633. (2) *Webber v. Furmer*, 4 Bro. P. C. 170.

surate to the period of actual duration of the partnership; and the same equity was held to apply to the assignees of A. on his bankruptcy as to a *bonâ fide* creditor, to whom the security of the instalments had been assigned (1).

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4. Where, on a contract for the sale of part of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract; and the attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effect of it, and such fine was accordingly levied, and the vendor died without declaring its uses, and without republishing his will previously made, by which he had devised the whole estate to his wife, who survived him, and after the vendor's death the attorney claimed the estate as his heir-at-law, alleging that the will was revoked by the fine, and brought actions of ejectment to recover possession thereof; and the widow filed a bill in Chancery for relief, and on an issue directed by that Court a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon the devise of the property comprised in it: the Court of Chancery, upon that verdict, decreed the attorney to be a trustee for the devisee of the lands and hereditaments which so descended to him as heir-at-law; and the House of Lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the conusor (his client) had made a will, were such professional ignorance and neglect as afforded a principle by which a Court of Equity might, independently of the ground of fraud, hold him to be a trustee for a third person of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person (2).

Heir-at-law, solicitor to the ancestor, fraudulently advising a fine to be levied, by which means a prior will was revoked, decreed a trustee for the devisee of the lands.

Ignorance by an attorney of effect of a fine on a will of lands, and omission to inquire whether conusor had made a will, were held such professional ignorance and neglect as to constitute him (being the heir-at-law) a trustee.

5. In *Wilmot v. Lennard* (3) it was held, on demurrer, that when a plaintiff at Law is nonsuited for want of evidence which

If plaintiff at Law is nonsuited for

(1) *Hamil v. Stokes*, 4 Price, 161.

(3) 3 Sw. 682; *et v. Field v. Beau-*

(2) *Bulkley v. Wilford*, 2 Cl. & F. 102; 8 Bli. (N.S.) 11.

mont, 1 Sw. 209.

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want of evidence withheld from him and in defendant's power, he will be relieved in Equity.

The issuing of a circular containing a deceit upon a trade and the public by misrepresentation, will be restrained.

the defendant has in his power and withholds from the plaintiff, the plaintiff shall be relieved in Equity, and have not only discovery but relief, and the defendant shall pay the cost of the nonsuit. In this case the plaintiff was, in an action against the defendant for coming upon premises under the pretence of an execution, and spoiling trees, &c., nonsuited for want of being able to identify the goods on account of the death of her father in the meantime, and the defendant refused to produce the inventory.

6. Where a circular was issued by parties recently in the employ of a firm of manufacturing engineers, which informed the trade and the public that they had commenced business on their own account, and made precisely the same goods as their former employers, with great improvements in the same, and could sell them at a much reduced price, as being satisfied with smaller profits, and it appeared that several customers of the former firm had been deceived by this circular, and had removed their custom to the new firm; Vice-Chancellor Sir G. M. Giffard held, that the facts contained in the circular not being such as there stated, the same was a deceit upon the trade and the public, and, as such, granted an injunction to restrain the further issuing of the circular, sale, &c. (1). But where a plaintiff prayed an injunction to restrain the defendant from falsely representing that the latter was carrying on business in succession to or in connection with him, and the bill averred general acts of misrepresentation, but one case only was made out, in which the defendant had opened a letter addressed to the plaintiff, answered it in his own name, and endeavoured to obtain the custom which that letter offered to the plaintiff; Vice-Chancellor Sir W. P. Wood held, that though this raised a grave suspicion against the defendant, it was not sufficient to entitle the plaintiff to an injunction (2).

7. The Court will not refuse relief to an injured party to a deed on the ground that he has executed it with an illegal purpose, if that purpose has not taken effect (3).

8. In every case where a plaintiff comes to the Court to set

(1) *Stevens v. Paine*, 18 L. T. (N. S.) 600.

(2) *Edgington v. Edgington*, 11 L. T. (N. S.) 299.

(3) *Symes v. Hughes*, 39 L. J. (Ch.) 304; L. R. 9 Eq. 475; 22 L. T. (N. S.) 462; *et vide* Bankruptcy, &c., pl. 20, p. 545, *ante*.

aside a deed on the ground of fraud, it is necessary that there should be clear and unequivocal proof of the facts which are said to constitute the fraud, and it must be shewn that the facts are such as in the eye of the Court amount to fraud (1).

9. *Suggestio falsi* or *suppressio veri*, to operate as a ground for the postponement of an equity, must occur in the transaction which *dat locum contractui* (2).

10. Fraud between the parties furnishes ground for an injunction. Thus, where A. obtained from B. a deed of land through fraud, in which C. was concerned, and afterwards confessed a judgment to C., who assigned it to D. for valuable consideration, without notice of the fraud, the Court held that the judgment created no valid lien upon the land, and that a conveyance to B. of the land must be decreed, discharged of the judgment, and a perpetual injunction awarded against its execution upon that land (3).

11. Acquiescence in the alleged fraud, by delay, will prevent an injunction founded upon such fraud. Thus, in an action to restrain a school district board in the United States from paying wages to a teacher, the complaint alleged, that "the certificate" of the county superintendent held by her, and her contract with the board, had been obtained by fraud; but the Court—presuming from the complaint (on demurrer), in the absence of any allegation to the contrary, that the plaintiff was aware of the several acts of fraud at about the time when they were committed, and had made no effort to have the certificate revoked by the superintendent, and the action not having been commenced until the teacher had taught under her contract about two months—held, that the plaintiff must be regarded as having acquiesced in the fraud by delay, and was not entitled to the interference of a Court of Equity (4).

Acquiescence
in fraud by
delay, disen-
titles to an
injunction
against the
fraud.

(1) *Lumley v. Desborough*, 22 L. T. (N. S.) 597.

(2) *Rolt v. White*, 3 De G. J. & S. 360.

(3) *Livingston v. Hubbs*, 2 John. Ch. 512 (Amr.)

(4) *Helms v. McFadden*, 18 Wis. 191 (Amr.)

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SECT. 24. *Mistake.*

1. In *Midland Great Western of Ireland Railway Company v. Johnson* (1), the House of Lords ruled, that when the construction of a contract is matter of law, and that has been determined at Law, a Court of Equity cannot interfere; and that although mistake is one of the grounds for equitable interference and relief, it must be a mistake of fact, and not of law, and that the construction of a contract is matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in Equity than he would be to recover at Law; and Lord Wensleydale also held, that upon the facts there were no grounds here for the interference of a Court of Equity. In this case a contract under seal had been entered into between a railway company and J. & K., by which the latter covenanted that they would work and keep in repair the locomotive engines of the company, and such rolling-stock as might be required by the company, for the term of five years, to be determined by either party in the manner in the contract mentioned; and it was agreed that J. & K. should be paid for such services certain mileage rates, to be paid monthly, but subject to a deduction of £5 per cent. per annum, to be made monthly, as upon the value of the rolling-stock at the commencement of the contract, by way of rent for the use of the same, and to a further deduction of £5 per cent., payable monthly, upon the value of the rolling-stock, as a depreciation fund; and there was also a general indemnity fund provided as a security for the performance of the contract; and J. & K. contended that the depreciation fund was to be a mere guarantee in the hands of the company, that the valuation was made upon that footing, and that they were entitled to the fund after the payment of any actual depreciation in the value of the rolling-stock, they having made considerable expenditure upon its improvement and in preventing any depreciation of its value, upon the belief that they would be entitled to it; and the contract having been determined by the company, J. & K. had brought an action against them for the amount of the depreciation fund, in

(1) 6 H. L. C. 798; 4 Jur. (N. S.) 643.

which they were unsuccessful, and they then presented a cause petition in the Court of Chancery in Ireland. The Lord Chancellor of Ireland held, that although, upon the construction of the agreement, they were not entitled at Law, yet an equity had arisen by the subsequent dealings of the parties, who had treated the fund as a mere indemnity to secure the company from loss, and that J. & K. were not precluded by the result of the action from obtaining relief in Equity. The House of Lords, on the ground that the construction of the contract was matter of law, which had been determined, and that a Court of Equity could not interfere, reversed the decision of the Lord Chancellor of Ireland (1). But notwithstanding the doctrine above enunciated, as to relief in Equity not being available in mistakes of law, there is no doubt that Equity has power to relieve in cases of mistake of law as well as in cases of mistake of fact (2).

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Equity can
relieve against
mistakes of
law as well as
of fact.

2. Where to a bill, which alleged, amongst other things, that the plaintiffs, believing themselves to be entitled under a devise to a dwelling-house and shop, entered into an agreement for the lease of the premises, then in a dilapidated state, to a tenant, in pursuance of which the tenant expended money in pulling down and rebuilding the premises; and that the defendant, who was, as it afterwards appeared, the actual owner of a moiety of the property, knew the true state of the title, and had made a claim to the whole property, which claim he repeated a few days before the improvements were commenced; and that he knew also that the improvements were being made, and that the plaintiffs and their tenants were acting under a mistake, and nevertheless permitted the works to be carried on without any objection during their progress; and prayed that the defendant might be decreed to confirm the lease, and in the meantime be restrained from suing out or executing the writ of possession under an action of ejectment, and evicting the tenant; a demurrer for want of equity was allowed; and it was also held, that in such a case the principle is the same, whether the owner and the party making the expendi-

(1) *Midland Great Western of Ireland Railw. Co. v. Johnson*, 6 H. L. C. 798; 4 Jur. (N. S.) 643. *Society*, 2 J. & H. 408; 32 L. J. (Ch.) 207; 10 W. R. 724; *Stone v. Godfrey*, 5 De G. M. & G. 76; *Saunders v. Annesley* (Lord), 2 Sch. & Lef. 73.

(2) See *In re Saxon Life Assurance*

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ture by mistake are strangers or tenants in common of the property; that the owner, having once and recently given notice of his claim to the property, was not, in order to exclude any equity in respect of the expenditure, on the ground of mistake, by the party in possession, or of acquiescence on his own part, bound again to assert it when the expenditure began, or while it was going on; that, in order to exclude such equity, it was not necessary that the notice of his claim, given by the claimant to the party in possession, should disclose any particulars relating to his title, nor, if the claim which he made exceeded what he was entitled to, was the party in possession justified in disregarding it, or supposing it to be unfounded. The Vice-Chancellor (Sir J. Wigram) said, that if a party in the possession of an estate, knowing that another claims the property, would, with his eyes open, spend money upon it, he knew of no case in which it had been held that he could, in the absence of special circumstances, keep the lawful owner out of possession unless he would reimburse the party in possession the expenditure he had made. That would indeed be improving a man out of his own estate. And he thought the same reasoning must apply where one party claims to be tenant in common with another, and that other denies the tenancy, and claims the entirety of the property; that he could not distinguish the two cases, and that he spoke, of course, of those cases in which the claim of the party out of possession had been distinctly made; that it was said, indeed, that Harding (the defendant), seeing the expenditure going on, ought in fairness to have re-asserted his claim, but that that, as a question of law, he could not accede to; and that where a party has once given distinct notice of his claim, the onus is on the other side to shew he had abandoned, or given reason to believe he had abandoned, his claim (1).

No injunction
to restrain
plaintiffs at
Law taking
out of Court
money paid in
by defendants
at Law in
ignorance that
plaintiffs were

3. In *Great Western Railway Company v. Cripps* (2), Vice-Chancellor Sir J. Wigram refused an injunction to restrain plaintiffs in an action at Law from taking out of Court money which the defendants at Law had paid into Court in the action, in ignorance that, upon such payment, the plaintiffs at Law were entitled to stay their action, and take the sum so paid. The Vice-Chancellor

(1) *The Master, &c. of Clare Hall v. Harding*, 6 Hare, 273.

(2) 5 Hare, 91.

said, that if the payment into Court gave the defendants at Law the right of taking the money out, he did not see that there was any equity to restrain them. The company knew the facts of the case. Making the payment in ignorance of one of its legal consequences did not appear to him to amount to such a mistake as called for the interference of a Court of Equity, if the act were binding at Law.

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entitled to
stay their
action and
take the sum
out of Court.

4. Where a party, with a full knowledge of all the facts, pays or executes his note for money voluntarily, under a mistake of law, he cannot recover back the money, or enjoin the collection of the note, on the ground of mistake (1). But where A., being in possession of land in the United States, owned by the State, as a settler, conveyed one acre to B., and C. afterwards obtained A.'s title, the deeds of all excepting B.'s acre, and the State conveyed the whole of the land to C., it was held, that B. was entitled to relief against this conveyance, and a judgment founded thereon (2).

SECT. 25. *Reversions.*

1. In *Wilde v. Ashley* (3), a perpetual injunction was granted against persons claiming a reversion upon the expiration of a lease made for a term of years shorter than was contracted for by the parties to the lease.

SECT. 26. *Penalties—Conditions.*

1. A condition attaching in default of principal payment was, in *Carroll v. O'Connor* (4), treated as a penalty and relieved against. In this case A. had mortgaged his property to D. to secure £700, agreed by D. to be taken in lieu of a judgment-debt of £3000, and the £700 was to be payable by instalments at certain times; and if not punctually so paid, D. was to be remitted to his original rights, and to have the mortgage security also; and the judgments were assigned, by a contemporaneous deed, to trustees for D., and

(1) *Hubbard v. Martin*, 8 Yerg. 498
(Amr.)

(3) 2 Jur. 679.

(2) *Dunlap v. Stetson*, 4 Mas. 349
(Amr.)

(4) 11 Ir. Eq. Rep. 200.

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on punctual payment of the £700 for A. and B. A. had previously mortgaged his property to B. as a counter-security, and for other debts. The instalments were not paid punctually, and the £3000 was therefore claimed in full; but the Court held, that though it would not have interfered if the arrangement had been between him and D. only, yet, as the rights of B. were involved, the condition in default of punctual payment should be treated as a penalty, and relieved against, and that this equity could be enforced by A. as well as by B.

2. Where A. filed his bill against B., C., and D., to have certain promissory notes given up to be cancelled, alleging a case of fraudulent conspiracy against B., C., and D., by which they obtained the promissory notes, by threatening to accuse him (falsely, as it was alleged) of having cheated one of them (B.) at cards, and to sue him for the penalties for that offence under 9 Ann. c. 14, s. 15; and the charge of conspiracy was altogether negatived by the Defendants' answers, but it was admitted by them that the promissory notes were obtained from A. in lieu of the statutory penalty which A. had incurred by cheating B. at cards: Vice-Chancellor Sir L. Shadwell held, that A. was entitled to have the notes delivered up to be cancelled, and made the injunction which had been obtained against negotiating or suing on the notes perpetual. The Vice-Chancellor in his judgment said, that B. in his answer did not flinch from the statement that the plaintiff was induced to give the notes in consequence of his fears being wrought upon by the representations of B.; but B. admitted that he thought it right to punish the plaintiff for what he had done—that is, to be an arbitrator in his own cause, and determine for himself what amount of penalty the plaintiff ought to pay for his (B.'s) benefit; and that if B. could have recovered the penalties at Law he was at liberty to do so; but that it appeared to him (the Vice-Chancellor) then, as it did when he continued the *ex parte* injunction, that it would be extremely dangerous to allow a party to be a judge in his own cause, and to determine, in his own favour, what amount of penalty ought to be paid for a breach of the law committed by another person, notwithstanding he may have suffered by it (1).

(1) *Osbaldiston v. Simpson*, 13 Sim. 513; 7 Jur. 736.

3. Where a lease contained a covenant against turning up the ground "under a penalty of £5 per acre," the Court held that, strictly, this was a penalty, and not in the nature of liquidated damages; and that the Court might interfere by injunction to stay waste (1).

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4. A Court of Equity will relieve against the penalty for not performing an unreasonable contract (2).

5. Equity may, and in many cases does, carry on the debt beyond the penalty of the security, as where the party has been delayed by an injunction of this Court, and the like (3); and although it is said in this case that a plaintiff in Equity cannot charge the debt beyond the penalty any more than he can at Law, yet Equity will nevertheless, under circumstances, carry the debt beyond the penalty—as where a man is kept out of his money by an injunction, or is prevented from going on at Law (4). So, where an advantage is made of money, interest shall be carried beyond the penalty (5). So, where a bond is only taken as a collateral security (6), or where the recovery of the debt is delayed by the obligor (7). And in a Court of Equity a debt secured by bond may be carried beyond the penalty of the bond, if the debtor has, by injunction, restrained the creditor from proceeding at Law, and there has been no misconduct on the part of the creditor (8). The Lord Chancellor stated, that in his opinion the plaintiff's demand was not to be limited by the amount of the penalties of the bond; for he had always considered, on the authority of *Duval v. Terry* (9), that a party who had been restrained from proceeding at Law, while the debt was under the penalty, had a right in a Court of Equity to principal and interest beyond the penalty of the bond.

Equity in
many cases
carries the
debt beyond
the penalty.

6. Where a mortgage is made with interest at £5 per cent., provided that if the interest be not paid within two months after due, then to pay £5 10s., this is in the nature of a penalty, and

(1) *Carden v. Butler*, Hay & J. 112.

Bro. P. C. 251.

(2) *Thomson v. Harcourt*, 1 Bro. P. C. 193.

(6) *Kirwane v. Blake*, 2 Bro. P. C. 333.

(3) *Hale v. Thomas*, 1 Vern. 350, 2nd Ed.; 2 Ch. Ca. 182, 186.

(7) *Pulteney v. Warren*, 6 Ves. Jun. 92; *et v. Clarke v. Seton*, ib. 411.

(4) *Duval v. Terry*, Show. P. C. 15.

(8) *Grant v. Grant*, 3 Russ. 598.

(5) *Lord Dunsany v. Plunkett*, 2

(9) Show. P. C. 15.

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A reservation of right to full payment of money due on an existing contract upon failure to pay a smaller sum, cannot be treated as a penalty.

the Court will relieve against it; otherwise, if £5 10s. per cent. be reserved originally, and to be lessened to £5 per cent. if duly paid within two months after due (1); and this distinction is recognised in *Holles v. Wyse* (2), where, on a mortgage at £5 per cent. interest, but if not punctually paid then to answer interest at £6 per cent. per annum, the Court looked upon the reservation of £6 per cent. but as a *nomine pœnæ*, to oblige the defendant to the more punctual payment. But the reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, will not be treated as a penalty, nor is it a penalty, or forfeiture, or anything of the kind, but simply a provision that, upon the terms upon which the indulgence is granted not being complied with, the original rights shall be preserved, and that the creditor shall be entitled to avail himself of those rights. Therefore, where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum, provided that sum is secured in a certain way, and paid at a certain day; but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt; such remitter to his original rights does not constitute a penalty, and Equity will not interfere to prevent its observance. And where H. was indebted to T. and S. in three different sums of money, which were the subjects of suits in Chancery; and in the first and third of these suits the sums had been ascertained, but no final decree had been made respecting them; and in the second suit there had been a final decree, and H. wished for time and facilities to be afforded him for payment of these debts, and T. and S. consented; and deeds were executed, by which it was arranged that H. should admit the amount of the debts claimed in the first and third suits, and should not use his power to appeal against the decree in the second suit; that he should give a first mortgage on his real estate as a security; and that he should pay certain amounts on certain days; and on these conditions T. and S. were to accept smaller sums in satisfaction.

(1) *Strode v. Parker*, 2 Vern. 316, 2nd Ed.; *et vide Thompson v. Hudson*, L. R. 4 H. L. 15; *et S. C., infra*.

(2) 2 Vern. 289; *et vide Nicholls v. Maynard*, 3 Atk. 519; *Bonafons v. Rybot*, 3 Burr. 1374.

and the deeds contained provisoes, which (in different forms of language) expressly reserved to T. and S. the right, if any of the stipulations in the deeds were violated, to enforce payment of the original amounts found and admitted to be due:—the House of Lords held, upon an appeal against an order of the Master of the Rolls, Lord Romilly, which had been affirmed on appeal by Lord Chancellor Chelmsford (*diss.* Lord Justice Turner), that this reservation of the right to enforce existing debts on nonpayment of the smaller and covenanted amounts was not a penalty against which Equity would grant relief (1).

SECT. 27. *Damages.*

1. In a case for an injunction which, from circumstances arising after the bill was filed, could not be granted, the Court, under the 21 & 22 Vict. c. 27, s. 2 (Lord Cairns' Act), awarded damages, though not specifically prayed for by the bill (2). And a plaintiff, though barred by acquiescence or otherwise from his remedy by injunction, may obtain damages under this statute, and that even though no action at law would be maintainable by the plaintiff (3). And when the Court has jurisdiction to decree the specific performance of an agreement, but from circumstances is unable to decree specific performance of certain parts of it, which are merely incidents to the agreement, and do not affect its substance, it has power to provide for them otherwise than by directing that they be specifically carried into execution, and notably by assessing the damages which, by reason of their non-performance, the plaintiff may have sustained (4). And although relief by award of damages, under the 21 & 22 Vict. c. 27, is in the nature of consequential relief, yet the Court has jurisdiction to grant it, notwithstanding that it may not be in a position (in this case because the plaintiff had obtained specific performance pending the suit) at the hearing to grant an injunction or a specific performance, on

(1) *Thompson v. Hudson*, L. R. 4 H. L. 1; 38 L. J. (Ch.) 431; L. R. (Ch.) 355.

(2) *Cotton v. Wyld*, 32 Beav. 266.

(3) *Eastwood v. Lever*, 33 L. J. (Ch.) 355.

(4) *Middleton v. Greenwood*, 10 Jur. (N. S.) 350; 10 L. T. (N. S.) 149.

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which the right to damages depends (1); but the Vice-Chancellor (Sir W. P. Wood) said, that this was a simple every-day question, which Courts of Common Law were in the constant habit of deciding, and was not one of that serious character where motions for a new trial might be expected, so as to render it desirable that the same Court should have the entire cognizance of the matter at issue; and he directed issues to be tried before a special jury as to the damages (if any) sustained (2). But the Court will not award damages in addition to specific performance under this statute (s. 2), on account of the simple non-performance of a contract where no special damage can be shewn to have arisen from the delay (3).

2. The Court has jurisdiction under the 21 & 22 Vict. c. 27 (though possibly not under the 25 & 26 Vict. c. 42), to assess the damages occasioned to a dwelling-house by an obstruction of light and air (4).

3. In *Tuck v. Silver* (5), Vice-Chancellor Sir W. P. Wood declared, that since the 21 & 22 Vict. c. 27, s. 2, empowering the Court to award damages in cases in which it has jurisdiction to entertain an application for an injunction against the commission of any wrongful act; it was more important than ever, now that the Legislature had given to this Court the power to do complete justice, so far as the plaintiff was concerned, by awarding him damages in suits of this description (*i. e.*, to restrain infringement of patents), to require the plaintiff, when obtaining an interim injunction against the alleged infringement of a patent, to give an undertaking to abide by any order the Court might make as to damages.

4. Under Lord Cairns' Act (21 & 22 Vict. c. 27), it is discretionary with the Court whether it will award damages, or leave the plaintiff to obtain them at Law. Under Sir J. Rolt's Act (25 & 26 Vict. c. 42), where the plaintiff has at the time of filing his bill no ground for equitable relief, the suit is improperly brought into Equity within the meaning of the Act, and the Court will leave the question of damages to a Court of Law (6).

(1) *Cory v. Thames Ironworks and Shipbuilding Company*, 11 W. R. 589.

(2) *Ib.*

(3) *Chinnock v. Ely (Marchioness)*, 13 W. R. 178.

(4) *Johnson v. Wyatt*, 12 W. R. 554.

(5) *Joh. 218.*

(6) *Durell v. Pritchard*, L. R. 1 Ch. 244; 14 W. R. 212; *Martin v. Douglas*, 16 W. R. 268, Ir. R.

5. When there has been an agreement—a direct and positive engagement—by the defendant, which goes to the root of the whole agreement, and the defendant has failed to perform his part, and the plaintiff has also failed to perform his part, the Court will restrain the defendant from bringing an action against the plaintiff for non-performance of his part until he (the defendant) shall have performed his part; and that, although the Court had no jurisdiction to compel the defendant to specifically perform his part; though it may be doubtful whether the 21 & 22 Vict. c. 27, s. 2—which enacts, that “in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct”—would apply to a case of this kind, so as to enable this Court to award damages (1). But the Court, having a discretion, directed in this case the damages to be assessed by a jury—*i. e.*, at Common Law (2).

6. Where at the time of filing a bill the plaintiffs were entitled to an injunction against a railway company to restrain them from using their land, damages were awarded to them at the hearing, although no injunction was in fact obtained, and the plaintiffs' interest in the land had meanwhile determined (3).

7. Where, in a suit for specific performance and damages, an issue was directed to be tried at Common Law to ascertain the amount of damages, and the plaintiff set up a claim for damages based on special user, but this claim was disallowed, and only a claim for damages based on common user allowed; on the cause being brought back into Chancery, the plaintiff was disallowed the extra costs occasioned by the larger claim (4).

(1) *Acraman v. Price, Davies v. South Coast Railw. Co.*, 37 L. J. (Ch.) 26; *et v. Betts v. Gallais*, *ante*, p. 265.

(2) *Ib.*

(4) *Cory v. Thames Ironworks and*

(3) *M'Rae v. London, Brighton, and Shipbuilding Company*, 16 W. R. 475.

1. Where A. made two of his daughters his executrices, and directed them to distribute a sum of £400, and also the residue of his personal estate, among themselves and their brothers and sisters, according to their needs and necessities, as they in their discretion should think fit; Lord Keeper Wright and the House of Lords restrained the exercise of this power, by decreeing a double share to the eldest son and heir, looking upon him as a necessitous person (1). However, the exercise by the Court of discretionary powers given to donees is now disclaimed by the Court, and such powers do not devolve upon the Court upon the non-execution of the powers by the donees (2).

2. Where a person being seised of a life estate in lands, and being indebted in various sums of money secured by his bonds, filed a bill to restrain proceedings at Law on them, on account of usury, and then entered into a consent in the cause with his creditors, whereby it was agreed that a certain sum should be found due on foot of those bonds, and the consent was embodied in the Master's report, and a decree pronounced declaring that the said sum was due and well charged on the lands in the pleadings mentioned; the Court held that the consent was such an act or contract on the part of the debtor as, when acted on and embodied in the decree of the Court, deprived him of the right of executing a power to charge the life estate with portions for younger children, so as to affect the rights of the creditors under the decree which had attached upon his life estate (3).

A party coming into Equity to restrain proceedings at Law, founded on defective execution of power, should admit that the power is badly executed at Law.

3. Where a party comes into Equity for an injunction against proceedings at Law founded on the defective execution of a power, he should admit by his bill that the power is badly executed at Law. The Master of the Rolls said: "The plaintiffs call on this Court to supply the defect in the execution of the power, or to reform and amend the deed of the 12th of May, 1783. A Court of Equity will, in favour of persons standing in the situation of the

(1) *Warburton v. Warburton*, 2 Vern. 859; *Alexander v. Alexander*, 2 Ves. Sen. 640; *Keates v. Burton*, 14 Ves. 437; 4 Bro. P. C. 1.

(2) *Muddison v. Andrew*, 1 Ves. Sen. v. Sugden on Powers, p. 174, 7th Ed. 57, 60; *Kemp v. Kemp*, 5 Ves. 849, (3) *Piers v. Tinte*, 1 D. & Wal. 275.

plaintiffs, supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of execution—as the want of a seal, or of a sufficient number of witnesses, or where it has been exercised by a deed instead of a will. But here it is, at Law, decided that there was no power in the trustees to sell the land without the growing timber, and there is no execution by the trustees of the power to sell the land with the growing timber; and I find no authority which applies to this case” (1).

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SECT. 29. *Trusts—Confidence.*

1. Where, in 1821, a chapel was vested in trustees for Particular Baptists; and in 1848 a dissension took place, and part of the congregation seceded and went to another chapel; and in 1860 the surviving trustees were induced, not knowing the real object, to appoint new trustees and vest the property in them; and immediately after the new trustees, who were attached to the seceding congregation, commenced an action of ejectment to obtain possession of the chapel: upon a bill by the surviving trustees and two deacons of the chapel, the latter suing “on behalf of themselves and all other members of the church at A.,” the first-mentioned chapel, the Court set aside the appointment, and restrained the action, with costs, and ordered new trustees to be appointed in chambers (2).

2. Where M., the manager of E.’s business, was allowed by him to send out bills to the customers in his (M.’s) own name alone, and M. afterwards locked E. out of the business premises, and E. several times had to break the lock to get in, and M. made an assignment of the premises and stock-in-trade to P.; and P. advertised them for sale, and E. filed a bill against M. and P., to restrain the exclusion and the sale; a demurrer by the defendants, for want of equity, was overruled with costs. The Vice-Chancellor, Sir W. P. Wood, said that M. had acquired the outward insignia of ownership by virtue of a trust, and he took advantage of that to lock out the

A party who has acquired the outward insignia of ownership by virtue of a trust, will be restrained from taking advantage thereof.

(1) *Cockerell v. Cholmeley*, 3 Russ. 565; 1 Russ. & My. 418; Taml. 435; 461.
(2) *Newsome v. Flowers*, 30 Beav. Cl. & F. 60; 6 Bli. (N. S.) 120.

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plaintiff, to assign his property to another, and to put it up for sale (1).

3. Where real estate had been conveyed to H. upon trust, and he was directed immediately, or as soon as conveniently might be, after the death of a tenant for life, to sell the same "for the most money and best price, that could be gotten, either by public auction or by private contract;" and on the death of the tenant for life, there being a difficulty as to the title, H., with the concurrence of the *cestuis que trust*, offered the estate to P. by private contract for £6000; and he subsequently entered into a contract for purchase, but before the offer was accepted the plaintiffs became the purchasers of the share of one of the *cestuis que trust*, and the offer made to P. was immediately countermanded, and notice given to him of the want of concurrence on the part of such *cestuis que trust*; but P. on the following day accepted the offer; and H. did not put the property up by public competition, or make further inquiry for a purchaser, but entered into an agreement with P. to sell the property to him for £6000; and the plaintiffs thereupon filed a bill for the purpose of having the agreement set aside, and to restrain H. from conveying the estate, and stated their willingness to give more than £6000 for the property, and subsequently stated that they would have given £7000; and H., supporting the sale to P., alleged that the sale to the plaintiffs by one of the *cestuis que trust* was of doubtful validity, and that all the other *cestuis que trust* were desirous of completing the contract with P; the Court below (Vice-Chancellor Sir J. Stuart) held that the agreement for sale by H. was not binding; but Lord Chancellor Campbell reversed this decision, on the ground that he did not consider H. had mis-conducted himself as a trustee in entering into the contract; but that the question whether P. was entitled to damages for the breach of the agreement was not for an Equity judge, but for a jury, under the direction of a Common Law judge (2).

4. A prayer for an injunction to restrain a trustee from selling, and to have a new trustee appointed in his place, involves relief, although nothing substantial is asked against him (3).

(1) *Eachus v. Moss*, 14 W. R. 327.

(3) *March v. Keith*, 30 L. J. (Ch.

(2) *Harper v. Hayes*, 7 Jur. (N. S.) 127.

245; 8 W. R. 600; 9 W. R. 504.

5. Where trustees under a marriage settlement, having no power to invest in land, had purchased copyholds with the trust-money, the husband and wife agreeing that the trustees should have power to sell, and indemnify themselves; and the trustees were also charged with other breaches of trust; and the surviving trustee proceeded to sell the copyholds, which were worth much more than the original purchase-money, and claimed to indemnify himself out of the surplus; Vice-Chancellor Sir R. T. Kindersley restrained him from selling until it was ascertained when it would be for the benefit of the persons interested, not *sui juris*, that the sale should take place; and the Vice-Chancellor questioned whether he would be allowed so to indemnify himself (1).

6. In *Yovatt v. Winyard* (2) Lord Chancellor Eldon granted an injunction to restrain a defendant, who had, as alleged, as assistant or journeyman, surreptitiously copied from a book the recipes of the plaintiff, from making use of, or communicating, certain recipes for veterinary medicines, and from printing and publishing directions for administering them, on the ground that there had been a breach of trust and confidence—the injunction not to extend to animals then under a course.

Assistant or journeyman surreptitiously copying recipes for medicines, restrained printing or administering them.

7. It is a principle of this Court, that a trustee shall not be permitted to use the powers which the trust may confer upon him at Law except for the legitimate purposes of his trust; and therefore a demurrer for want of equity cannot be sustained to a bill seeking to restrain a trustee from so doing, although the plaintiff may have a remedy at Law (3). In this case the equity stated in the plaintiff's bill was, that he (the plaintiff) indorsed the bill of exchange to one L. without consideration, in order that L. might recover upon the bill against Lyon, the acceptor, for the plaintiff's use, and that L. had, in like manner, indorsed the bill to the defendant Strutt without consideration for the same purpose; and the Vice-Chancellor, Sir L. Shadwell, said that, according to the statements in the bill, therefore, Strutt was a trustee of the bill for the plaintiff, and that upon this state of the case alone it could not be disputed that the plaintiff would be entitled to the relief he prayed by the bill—*i. e.*, the delivery up of the bill,

A trustee will not be permitted to use the powers the trust confers upon him at Law except for the purposes of his trust.

(1) *Wiles v. Gresham*, 17 Jur. 779.

(2) 1 Jac. & W. 394.

(3) *Balls v. Strutt*, 1 Hare, 146.

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and an injunction to restrain an action on the bill by Strutt against the plaintiff and the negotiation of the bill.

8. The Privy Council, on an appeal from Jamaica, dissolved an injunction obtained by the *cestui que trust* of a moiety of the produce of certain plantations and estates there, prohibiting the attorney and manager, who was also one of the trustees for the same moiety, from shipping or consigning any portion of the produce save as such *cestui que trust* should direct, on the grounds (as the Privy Council observed) stated in the argument for the appellant (i. e., the attorney and manager). These were, amongst others, that by the trust of a marriage settlement of the respondent the produce, &c., of a moiety of the estate were payable to her separate use, and that this imposed on the trustees (the appellants) the duty of converting the produce and paying the surplus profits of the moiety to the respondent; that the trusts (of the settlement) did not permit a delivery of the produce to the respondent or to the person whom she should appoint; that as a trustee the appellant had a lien on the produce of the undivided moiety for the price of supplies and costs of management, &c. of that portion, and the tenant in common of the other moiety (who was not made a party to the suit), a lien for the price of supplies, &c., and of upholding the estates, and until those liens were discharged the respondent had no right to any part of the crops (1).

The Court will not enforce a voluntary trust-deed in favour of creditors against the debtors, and they may vary the trusts of such a deed.

9. Where there was a trust-deed conveying lands to trustees for the payment of the creditors of two debtors, no creditor being a party, nor was the deed made by agreement with any creditor, neither was there any release or other consideration moving from any of the creditors, and the debtors afterwards executed other deeds varying the trusts of the first; a motion for an injunction by a creditor under the first deed, who had filed a bill to restrain the trustees from executing the trusts of the subsequent deeds till they had raised money sufficient to answer the first trusts, was refused by Lord Chancellor Eldon, on the ground that, the trust being voluntary, the Court would not enforce it against the debtors, who might vary it as they pleased (2).

(1) *Israell v. Rodon*, 2 Moo. P. C. C. 43. See 3 Sim. 1, n., and S. C. more fully reported, 3 Sim. 14; *v. Garrard v. Lauderdale* (Lord), 3 Sim. 1.

(2) *Wallwyn v. Coutts*, 3 Mer. 707.

10. Where by marriage articles the household goods and plate of the wife were assigned to trustees, the husband to have the use of them for his life only, and afterwards to the wife, her executors and administrators; but if the husband survived, then the absolute property to be to him; and A. having got judgment against the husband, took the goods in execution, and the wife's friends gave security to the sheriff, who returned *nulla bona*; whereupon A. brought an action against the sheriff, and recovered, and afterwards the same goods were taken in execution by B., another creditor of the husband, and the sheriff, on the like security given him by the wife's friends, returned *nulla bona*; whereupon B. also brought an action and recovered, and the wife's trustees filed a bill for relief; the bill was dismissed with costs, it being all at Law in whom was the property of the goods (1). The Court said, that there being an assignment made of the goods in question to trustees, the matter was purely, at Law, whether such assignment well vests the property in the trustees, and whether fraudulent as against a creditor or not; and that that having been already tried, there was no room for Equity to interpose; and that if this Court should relieve the plaintiff, it must declare that not to be fraudulent in Equity which had been found to be so in Law; and that as to that part of the case where two several creditors have recovered the value of the selfsame goods, it was the folly of the party not to provide better for himself; for although when a man recovers against another in trover, there the property of the goods vests in the defendant against whom the damages were recovered (2), yet where the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him; but they remain in the party, and are liable to any subsequent execution for his debt (3).

11. In — v. *Hancock* (4), Lord Chancellor Eldon said, that though it was true that where an infant conveyed as a trustee, within the statute 7 Ann. c. 19 (the then statute relating to the

(1) *Underwood v. Mordant*, 2 Vern. 238, 2nd Ed.

(2) *Putt v. Rawsterne*, Pollex, 640, 641; *Adams v. Broughton*, 2 Str. 1078.

(3) But where the sheriff has seized

goods in execution, he may have trover or trespass against him who takes them away: *Wilbraham v. Snow*, 2 Saund. Rep. 46.

(4) 17 Ves. 384.

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conveyances of infant trustees), not being so, he would not be bound by his conveyance under such an order; yet if it were a case in which he would be bound to convey, when of age, his conveyance being voidable only during his infancy, and until avoided passing the legal estate, and no one having the right to elect for him whether it should be void or not, he would, when he became adult, be in such a situation that if he sought at Law to avoid his deed a Court of Equity would prevent him.

12. Where in the course of proceedings between A. and B. in the King's Bench a reference had been directed to the Master of that Court, in which A. was to give credit for all sums of money received by him for or on account of B.; and in taking that account the Master had refused to charge A. with a sum received by him in payment of a debt due to B., which debt B. had assigned to C. without consideration, and upon a trust subsequently declared for him (B.); and the Court of King's Bench refused to direct the Master to review his allocatur; it was held, upon demurrer, that B. might maintain a bill in Equity against A. and C., praying a declaration that the assignment of the debt to C. was merely in trust for B., an account against A., and an injunction to stay proceedings on the allocatur of the Master. The Lord Chancellor, Lord Eldon, said: "The bill stated that the Master of King's Bench refused to try the equitable right, and that the Court (of King's Bench) concurred in the opinion upon which he acted, and that that opinion was, that a Court of Law could not try the plaintiff's equitable right," and for this reason the demurrer for want of equity was overruled (1).

13. Where A. and B., partners, were indebted to C. and D., the plaintiffs, and A., by letter, proposed to assign a claim which A. and B. had upon the estates of P.; and certain properties of P. having been sold under a decree, were purchased by A. in his own name. but, as he alleged in letters to C., in trust for C. and D.; and A. having shortly afterwards committed an act of bankruptcy, executed deeds declaring that he held in trust for C. and D.; and his assignee having obtained a judgment in ejectment against part of the premises, a bill was filed praying that he should be restrained from executing a *habere*; that he should be declared a trustee for

(1) *Farquharson v. Pitcher*, 2 Russ. 81.

the plaintiff as to all the premises, and that he should be directed to convey to them : the Court, in Ireland, held that the trust was clearly established, and that the plaintiffs were entitled to the conveyance sought (1).

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14. Some of the clauses which are frequently introduced into the deeds of trust for sale are of such a kind that a Court of Equity will not act upon them where the trustee for sale is also the creditor for whose benefit the trust is created (2).

15. The Court will not restrain trustees for sale from completing a sale on the ground that they cannot shew a good title (3).

16. A trustee is not answerable for an innocent mistake, from which he derives no advantage ; and a Court of Equity will grant a perpetual injunction, to prevent any proceedings at Law grounded on such mistake (4).

A trustee is not answerable for an innocent mistake.

17. Where a trustee allowed one of his *cestuis que trust* to have the trust fund, with a view to its investment in foreign funds, and the *cestui que trust* went to America and invested it in his own name, and afterwards sold out a part, and, remitting the money to agents in London, came home, and the trustee impounded the money so remitted in the Lord Mayor's Court, this Court granted an injunction restraining proceedings on the part of the *cestui que trust* to get it out (5).

Cestui que trust restrained proceeding to get a fund, produced from a sale of part of securities purchased with the original trust fund, out of the Lord Mayor's Court.

18. Trustees to preserve contingent remainders may, for the benefit of the contingent remainders, bring a bill to stay waste in the tenant for life (6).

19. Unless there is a distinct admission, or circumstances proved, which raise the presumption that certain moneys are trust-moneys, the Court will not interfere by injunction to order such moneys to be paid into Court before the hearing of the cause, where there is a doubtful case to be tried at such hearing (7).

Unless there is an admission or a presumption that certain moneys are trust moneys, the Court will not order such moneys to be paid into Court before the hearing.

20. Equity will enjoin a party holding land in trust from parting with his control over it (8). So, where a trustee in the United

Equity will restrain trustee of land

(1) *Johnson v. Perrin*, Hayes, 322. (Ch.) 27.

(2) *Roberts v. Bozen*, 3 L.J. (Ch.) 113.

(3) *Ib.*

(4) *Crookshanks v. Turner*, 7 Bro.

P. C. 255.

(5) *Hopkins v. Newton*, 9 L. J.

(6) *Perrot v. Perrot*, 3 Atk. 95.

(7) *Bank of Turkey v. Ottoman*

Company, 14 W. R. 819.

(8) *Hun v. Freeman*, 1 Ham. 490

(Amr.)

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parting with
the land, and
from removing
a trust fund
beyond the
reach of the
Court.

States, appointed by deed of A. to collect money and pay all the debts of A., resides in a distant State there, and a bill there by a creditor alleges that he is about to remove the trust funds beyond the reach of the Court, an injunction is proper to restrain such removal (1). So, where *cestuis que trust* were empowered by the trust-deed to change the investment of the trust fund, they were enjoined from making any change in such investment, or interfering with the income or profits, without the sanction of the Court on notice to their creditors (2).

21. A trustee may be enjoined from submitting to arbitration a question in which the *cestuis que trust* alone are interested, without their consent (3).

Ejectment for
land pur-
chased by a
party in a
fiduciary posi-
tion, re-
strained.

22. An ejectment for land may sometimes be restrained upon the ground of equitable estoppel or implied trust. Thus, where the route of a raceway of an incorporated company was located over certain lots of A., and the company appointed a committee to negotiate with the landowners for the purchase of the land over which the route was located; and B. was president and also an acting-manager of the company, and offered to negotiate for the committee the purchase of A.'s land for the company, and the committee thereupon entrusted the negotiation to B.; and B. bought A.'s lots for 50 dollars a lot, and took a deed in his own name, the deed stating the amount paid as 100 dollars per lot; and the company offered B. what he had paid for the lots, and went on and constructed their raceway over the land, B. was perpetually enjoined from bringing ejectment to recover possession (4). In the same case B. owned another lot over which the raceway was located and constructed, and was president and acting-manager of the company at the time of such location and construction, and made no objection, but was active in the direction and proceedings of the company in locating and constructing the raceway on and over the lot: he was perpetually enjoined from bringing ejectment to recover possession, and an issue was ordered to ascertain the value of the lots (5).

Ejectment by
owner of land
standing by,
upon posses-
sion being
taken, &c.,
and being in a
fiduciary posi-
tion, re-
strained.

(1) *Symons v. Reid*, 5 Jones, Eq. 327 (Amr.)

(2) *North American Coal Company v. Dyett*, 7 Paige, 1 (Amr.)

(3) *Crum v. Moore's, &c.*, 1 M'Cart. 436 (Amr.)

(4) *Trenton, &c., v. McKelway*, 4 Halst. Ch. 84 (Amr.)

(5) *Id.*

SECT. 30. *Charities.*PART I.
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1. Upon a bill filed against the municipal corporation of London, by the donation governors of St. Thomas's Hospital, to restrain them from acting upon a retainer which had been issued by them in the name and under the seal of the Chartered Hospital Corporation, constituting a person to be the attorney of the governors for the purpose of carrying into execution the powers vested in the governors by an Act of 1862; and also to restrain the municipal corporation from affixing the hospital seal to any document relating to the hospital without the consent of the donation governors: the Lord Chancellor held, upon a consideration of the charters of Edward VI., and statutes of 1782 and 1862, and articles of agreement, that the whole of the administration, management, and conduct of the charity, St. Thomas's Hospital, including the right of fixing upon and contracting for the site of a new hospital, was vested in the governors, called donation governors, and that the Chartered Hospital Corporation—*i.e.*, the mayor, citizens, and commons of London—was not at liberty to use the hospital seal save at the instance and upon the application of the donation governors; and also that the word "governors" in the Act of 1862 meant the donation governors, and not the Chartered Hospital Corporation; but that, as a question of difficulty had arisen upon the construction of the Act of 1862, the municipal corporation was justified in sealing a retainer in the name of the Chartered Hospital Corporation for the purpose of trying the question (1).

2. Upon a motion to restrain the governors of the Foundling Hospital from proceeding in the execution of certain contracts for letting upon building leases, and from themselves building, the Court held, that nothing was better established than that this Court does not entertain a general jurisdiction, or regulate or control charities established by charter, unless the governors have also the management of the revenues; then this Court does assume a jurisdiction of necessity, so far as they are considered trustees of the revenue, and abuse their trust; and the Foundling Hospital is

This Court does not entertain a general jurisdiction over charities established by charter, unless the governors have management of revenues.

(1) *St. Thomas's Hospital (Governors) v. Corporation of London*, 11 L. T. (N. S.) 520.

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an institution of this kind; therefore, on motion, an injunction to restrain the governors from building round it was refused, a breach of trust, or probability of it, not being made out; and it was also held, that it was not in the nature of waste to turn meadow-land into buildings, unless clearly injurious (1).

Commissioners (here) restrained applying rates to the costs of an application to Parliament.

Paving and lighting are general, and not confined to the ratepayers, and therefore Attorney-General has a right to sue.

3. Where, by the P. Paving Act, 1825, certain commissioners were constituted, with powers of making rates, and for the purposes therein specified, and it was directed that the sums so to be raised should be applied for certain purposes there enumerated, and no other purpose whatever, and the costs of other applications to Parliament were not among the enumerated objects; and by the Municipal Reform Act, 1836, certain duties were taken from the charge of the commissioners and imposed upon the corporation; and in December, 1852, the commissioners gave notice of their intention to apply to Parliament for a new Act, and proceeded to apply their moneys raised under the Act to the costs of this application, and some of the ratepayers, as relators, filed an information to restrain this: Vice-Chancellor Sir W. P. Wood held, on an interlocutory motion for an injunction, that this was an improper application of the moneys raised under the Act of 1825, and that the Attorney-General had a right to sue, the purpose of paving, lighting, &c., being general, and not confined to the use of the ratepayers (the relators) alone, and that the delay from December to April was not sufficient to deprive the plaintiff of the right to an injunction (2).

4. The Court, upon an information praying a scheme, the removal of the trustees, on the ground that they were disqualified, and an injunction to restrain the trustees from appointing a new schoolmaster, and from dealing with the property—having inferred, not only from the time the deed of endowment was executed, when there was very little dissent, but from repeated references to the parish church in the deed of endowment, that a school founded in 1601 was a Church of England school—held, that the trustees, and the schoolmaster also, if possible, ought to be members of that church, but that the instruction was open to scholars of every religious denomination; but the Court, though holding that a trustee had been

(1) *Att.-Gen. v. Governors of Foundling Hospital*, 2 Ves. Jun. 42.

(2) *Att.-Gen. v. Eastlake*, 17 Jur. 801.

originally improperly appointed, declined to remove him, there being a great difference between appointing trustees in the first instance, and removing them when once appointed. And residence within a parish being (here) a necessary qualification of trustees on their appointment, the Court held, that their removal out of the parish after their appointment, to such a distance as to make it impossible to attend to their duties, would be a vacating of their office (1).

5. Where the revenues of a charity grammar-school had increased tenfold, the Court, on a vacancy, restrained the appointment of a new master until something had been settled as to a new scheme; but subsequently, liberty was given to appoint a new master, he taking his office subject to any future alterations to be directed by the Court (2).

6. The master of a grammar-school appointed by the dean and chapter of a cathedral church, and which grammar-school was, by the statutes imposed by the founder, directed to be established and maintained from the endowments of such church, which were held in *frankalmoigne*, was held, by Vice-Chancellor Sir J. Wigram, not to be a *cestui que trust* (in the sense in which the word "trust" is used in this Court in the ordinary case of trustee and *cestui que trust*) of the stipend and emoluments of the office, but only an officer of the cathedral church, appointed to perform one of the duties imposed upon it by the statutes of the founder (3). In this case the dean and chapter of the cathedral church of Rochester, in exercise of a power vested in them by one of the statutes of the founder, summarily dismissed the head-master of the grammar-school attached to the cathedral from his office, without hearing him in his defence, upon the ground that he had published a pamphlet reflecting on the dean and chapter in the administration of the cathedral funds, in reference to certain of the scholars. Upon a motion for an injunction, the Court held, that the master, according to the true construction of the statutes by which the cathedral was governed, was to be considered only such an officer of the cathedral church as before mentioned, and that his office was not

Master of grammar school not (here) a *cestui que trust*, but only an officer of the cathedral church.

(1) *Att.-Gen. v. Clifton*, 32 Beav. 596; 9 Jur. (N. S.) 939; 9 L. T. (N. S.) 136. (2) *Att.-Gen. v. Warden, &c., of Louth Free School*, 14 Beav. 201. (3) *Whiston v. Dean and Chapter of Rochester*, 7 Hare, 532; 18 L. J. (N. S.) Ch. 473.

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But if a visitor, was, in whom was the jurisdiction to redress that wrong; that if the jurisdiction (here) would be in him.

If no visitor, *semble*, the Court of Queen's Bench the proper tribunal.

If no trust, Chancery will not try the right to office of school-master.

one of trust, giving this Court jurisdiction to interfere on his behalf as schoolmaster; and also that the Court had no power by injunction *pendente lite* to prevent the dean and chapter from removing the master from his office, and from appointing another master in his stead, unless a special case for that purpose was made by the proceedings. The Vice-Chancellor, Sir J. Wigram, said: Excluding, then, the case of trust, and assuming also—what he certainly was not disposed to question, though he gave no opinion upon the point—that the removal of Mr. Whiston from the master-ship without hearing him in his defence was a wrong, the question was, in whom was the jurisdiction to redress that wrong; that if there were a visitor whose powers were not so circumscribed as to exclude the jurisdiction, he apprehended it was clear that the jurisdiction must be in that visitor, and that his decision upon the point was final; that the jurisdiction of the Court of Queen's Bench might be called in by mandamus to compel the visitor to act, and that the jurisdiction of that Court, and in some cases of the Court of Chancery also, might be called in by prohibition to restrain the visitor from exceeding his jurisdiction; and that where there was no visitor, or the power of the visitor was extinct or suspended (*Manchester College Case*) (1), or is not pleaded in proceedings for a mandamus (*Dr. Bentley's Case*) (2), the Court of Queen's Bench might be the proper Court to redress the wrong; and that the only question which he had to determine was, whether the Court of Chancery, in the exercise of its ordinary jurisdiction by bill, in a case in which no trust exists, can try the plaintiff's right to the office of schoolmaster, from which the defendants had exercised the power of excluding him; and that he was of opinion that this question must be answered in the negative, and that, excluding trust, he could not find a single authority which supported the proposition; and that he could not recognise the general proposition, that in every case of a dispute arising about a right of office, the Court of Chancery can be called upon, as a matter of course, to prevent the claimant from being displaced until the right shall have been tried; and that no special case for the interference of the Court had been made before him; and he said there were numerous cases, even of irreparable mischief, in which the Court

(1) 1 Bar. 52; 1 W. Bl. 22.

(2) *Fortescue*, 202.

had refused to interfere between adverse claimants, where no ultimate relief could be had in this Court. But where, by a scheme of the Court for the regulation of a grammar-school, at Ludlow, founded by King Edward VI., authority was given to the trustees, "upon such grounds as they should at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just," to remove the master at once, and confirm it at a subsequent special meeting; and the trustees having, as they alleged, grounds of complaint against the master, without his knowledge had referred the matter to a committee, who investigated the case in his absence and without his knowledge, and reported against him; and the trustees, without communicating the report, or hearing him, confirmed it in his absence, and resolved to remove him; and they had summoned a second meeting to confirm the resolution, and the master then attended and was heard, and the removal was confirmed without any other hearing or inquiry in his presence: upon a bill by the schoolmaster, praying a declaration that the resolution was invalid, and for an injunction to restrain the defendants, the trustees, from enforcing it, and also to restrain an action of ejectment brought by them to recover possession of the schoolhouse and schoolroom and premises, the Master of the Rolls, Lord Langdale, held, that the regulation did not confer upon the trustees an arbitrary power to dismiss the master upon any grounds which they might deem just, free from any control of this Court; and, secondly, that the master had had no proper opportunity afforded him of defending himself, no sufficient means of explanation, and no means of proving his defence, if he had any; and, on motion, the trustees were restrained from enforcing the resolution of dismissal (1). And in the case of the *Free Grammar School of Chipping Sodbury* (2) it was held, that the master of a free school has an estate of freehold in his office, and is not removable at the pleasure of the patrons of the school; and the Court will, upon petition, restrain an ejectment brought by the

Trustees of school have no arbitrary power (here) to dismiss the master.

The master of a free school has an estate of freehold in his office, and is not removable at pleasure of patrons. (3)

(1) *Willis v. Childs*, 13 Beav. 117.

(2) 8 L. J. (Ch.) 13.

(3) By the 22nd section of the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), the charity commissioners

appointed under that Act are authorized to empower trustees of a charity (with the consent of the visitor, if any) to remove the schoolmaster or mistress, or any other officer of the charity. By

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patrons to evict the master from the possession of the school-house.

Agreements between master of free grammar school and patrons, having a tendency to alter its character, are invalid.

7. Agreements entered into between a master of a free grammar school and the patrons as to the mode of conducting the school, which have a tendency to alter its character, are invalid, and do not bind the master; and the patrons are guilty of a breach of duty when they require or induce a master, or a candidate for the office of master, to enter into such agreement (1).

8. Where, by certain deeds, lands were conveyed to trustees for the purpose of erecting, preserving, and maintaining a church in connection with and according to the form and usages of the Established Church of Scotland; upon a motion being made for an injunction to restrain the use of the church built in pursuance of such trust for any other purposes, the Court, in the absence of information as to the exact meaning to be attributed to the words by which the specific purposes of the trust were professed to be indicated, refused to put a construction on them, but granted the motion, and enjoined the trustees from using, or permitting to be used, the church for any other purposes than those specified in the deed itself, and in the words of that deed (2). The Court has jurisdiction over ecclesiastical property when affected by a trust (3). And where, under the deed of endowment, a chapel was to be used and enjoyed as a place of public religious worship for the service of God, by the society of Protestant dissenters of the denomination of Independents, and professing the doctrines contained in the catechism of the assembly of divines held at Westminster, commonly called "The Assembly's Catechism," and also by such other persons as should thereafter be united to the said society, and attend the worship of God in the said meeting-house; and several years after the date of the deed the surviving trustee and the congregation of the chapel converted the nature of their

The Court has jurisdiction over ecclesiastical property when affected by a trust.

The Court will restrain a chapel from being used for any other service than that declared in the deed of endowment.

the 14th section of the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), masters and mistresses of endowed schools (not being endowed grammar schools) are removable by the trustees with the consent of the visitors, if any, with the subsequent approval of the

Board of Charity Commissioners.

(1) *Free Grammar School of Chip-ping Sodbury*, 8 L. J. (Ch.) 13.

(2) *Att.-Gen. v. Munro*, 9 Jur. 461.

(3) *Att.-Gen. v. St. John's Hospital, Bedford*, 2 De G. J. & S. 621; 11 Jur. (N. S.) 629.

religious worship into that of the "Particular Baptists;" Vice-Chancellor Sir R. T. Kindersley held, that the use of the chapel must be restored to those professing the original Independent doctrines, and removed the trustee and appointed new trustees (1).

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9. Where by the deed of settlement of a Baptist chapel it was provided that the minister should be liable to be removed by the direction of the church, declared at one meeting and confirmed at a second meeting, and that all directions of the church should be declared by a majority of communicants present at a meeting of which notice should have been given in the chapel during divine service on Sunday morning, at least four days previously; and that whenever the church should have to consider the appointment or dismissal of a minister, the notice should expressly state the object of such meeting; and that each of the directions to be declared at any such meeting should be reconsidered at a second meeting, to be convened by public notice, to be given in manner aforesaid, expressly stating the object thereof; and on Sunday, the 18th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday, "for the purpose of bringing charges against, and considering the dismissal of," the minister; but no copy of the charges was sent to the minister; and on the 24th of October the meeting was held, and a resolution passed, that in consequence of certain offences alleged to have been committed by the minister it was agreed that "he is not a fit and proper person to occupy the position of pastor, and that his office as pastor cease forthwith;" and on Sunday, the 25th of October, a notice was read in the chapel to the effect that a meeting would be held on the following Saturday, "for the purpose of confirming and ratifying" the resolutions passed at the meeting of the 21th; and on the 31st of October the meeting was held, and a resolution passed that the minutes of the meeting of the 24th be "passed, confirmed, and ratified:" Vice-Chancellor Sir W. M. James held—upon a bill filed by the trustees of the settlement against the minister, praying that the defendant might be restrained from taking, or endeavouring to take, possession of the pulpits in the chapels at B., vested in the plaintiffs as trustees

(1) *Att.-Gen. v. Aust*, 13 L. T. (N.S.) 235.

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In absence of
special usage,
rules, or agree-
ment, a dis-
senting mini-
ster is not
entitled to
hold office for
life or during
good
behaviour.

of the settlement, and from acting or officiating in any manner whatsoever as minister thereof, and from in any way disturbing or interfering with the performance of divine worship in the chapels, and from in any manner intermeddling or interfering with the trust property vested in the plaintiffs by the deed of settlement—that the notice of the 25th of October was invalid, because it did not specify the resolutions of the intended confirmation of which it gave notice; and hence that the resolution of the 31st of October, and the dismissal of the minister purported to have been thereby effected, were also invalid (1).

10. In the absence of special usage, rules, or agreement, a dissenting minister appointed by his congregation is not entitled to hold office for life, or during good behaviour, against the will of the majority of such congregation. And where, by the trust deeds of a congregation of Independents, a chapel, a house, and other property were vested in trustees for the use of the congregation, and to permit the minister for the time being to occupy the house, and the deeds contained no express provision for the appointment or removal of a minister; and in 1866, G. was invited by a resolution of the church members of the congregation to become co-pastor with the then minister; and in 1868 a majority of the church members resolved that he be dismissed, and the majority of the trustees concurred in this resolution; and he claimed to hold his office for life, in the absence of immorality, or preaching contrary to the tenets of the denomination, which was not charged: Vice-Chancellor Sir J. Stuart—upon a bill by ten out of the eleven trustees against G., the co-pastor, one J. P., alleged to have collected the pew-rents for the minister, and C., the remaining trustee, praying for a declaration that the defendant G. had been duly dismissed, and that he might be restrained from preaching and acting as co-pastor, and that he and J. P. might be restrained from collecting the pew-rents, and praying an account of the moneys received—held that G. was duly dismissed, and made a decree declaring G. not entitled to officiate in the chapel against the will of the majority of the trustees and congregation, and granted an injunction against him and J. P. in the terms of the prayer, but

(1) *Dean v. Bennett*, L. R. 9 Eq. 625; 22 L. T. (N. S.) 368; 39 L. J. (Ch.) 674; 18 W. R. 487.

said it was unnecessary to direct any account, and that none had been pressed for; with costs against G. and J. P., but that the trustee, C., having refused to join, must bear his own costs (1).

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SECT. 31. *Wills.*

1. In *Dimes v. Steinberg* (2), Vice-Chancellor Sir J. Stuart, on a demurrer for want of equity, held that a bill can be maintained in Equity by one of the next of kin against the executors and one of the legatees in a will fraudulently obtained by them from a person of unsound mind, praying for an account, and for an injunction and receiver pending a suit in the Ecclesiastical Court to recall the probate. And in *Sheffield (Duchess of) v. Duke of Buckinghamshire* (3), it was held that where parties are dissatisfied with a probate, this Court will suspend its determination till after a trial upon the validity of it in the proper Court; and though neither this Court nor a Court of Law can determine the validity of a probate in an "adversary" way, yet if it come before the Court on an incident in the cause, and that incident is admitted by the parties, this Court or a Court of Law may determine it, and hold the parties bound by their admission; and if either of the parties would afterwards bring a new suit to contest that determination, this Court would certainly grant a perpetual injunction. And in *Ball v. Oliver* (4), it was held that the jurisdiction of a Court of Equity pending a disputed administration in the Ecclesiastical Court to protect the property by a receiver, was not ousted by the power of the Ecclesiastical Court to appoint an administrator *pendente lite*, and an injunction was granted restraining the defendant, pending a suit in the Ecclesiastical Court to recall letters of administration to the defendant, from getting in or disposing of the personal estate.

2. Where a trustee of an estate of a lunatic obtained a devise from the lunatic for his own benefit, and upon the death of the

(1) *Cooper v. Gordon*, 17 W. R. 908;
20 L. T. (N. S.) 782; L. R. 8 Eq. 249;
38 L. J. (Ch.) 489.

(2) 2 Sm. & Giff. 75.

(3) 1 Atk. 630.

(4) 2 V. & B. 96; *et v. Atkinson v. Henshaw*, 2 V. & B. 85.

A bill can be maintained by one of next of kin against executors and one of legatees in will fraudulently obtained from a person of unsound mind for an injunction pending a suit to recall probate.

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lunatic obtained possession, and the heir brought trespass, and was nonsuited, and then filed a bill to set aside the will, and stay execution in an action of ejectment, which the Vice-Chancellor granted on the ground of seeing the result of the bill; and also held, that if the plaintiff succeeded in setting aside the will, then, as the defendant in Equity would have been guilty of a breach of trust in disputing the title of the *cestui que trust*, the Court would avail itself of the power of setting off one set of costs against the other: this, upon an appeal, was held by the Lord Chancellor to be inequitable (1).

The Court of Chancery has not jurisdiction to try the validity of wills.

3. In *Jones v. Frost* (2), the Court allowed a demurrer to a bill praying that an alleged pretended will of real and personal estate might be delivered up to be cancelled, and an injunction and a receiver, till letters of administration should be granted, the pendency of a suit in the Ecclesiastical Court not being distinctly alleged, and the Court of Chancery not having jurisdiction to try the validity of wills either of real or personal estate. And in *Gingell v. Horne* (3) a demurrer was allowed to a bill praying that a will of personalty might be declared to have been fraudulently obtained, and that the residuary legatee might be declared a trustee for the plaintiffs, on the ground that a Court of Equity has no jurisdiction to relieve against the probate of a will, unless the consent of the next of kin to the granting of it was fraudulently obtained. And so, in *Barnesly v. Powel* (4), it was held by Lord Chancellor Hardwicke that this Court will relieve against a probate obtained by fraud, and in this case a deed importing a consent thereto was set aside in this Court, and not in the Ecclesiastical Court; and the defendant was decreed to consent to a revocation of the probate.

This Court will relieve against a probate obtained by fraud—defendant decreed to consent to revocation.

Trustees of a settlement by settlor of property, obtained by letters of administration sued out fraudulently, restrained dealing with the capital.

4. Where a man (the defendant R. V.) fraudulently obtained administration to an intestate's estate by representing himself as sole next of kin, knowing his father was alive and was the next of kin, and settled the property thus acquired on his own marriage, being in debt at the time; upon a bill by G., the husband of one of the sisters of the defendant R. V. (who was a creditor of R. V.) charging that on his obtaining administration to his uncle's estate, he became

(1) *Murley v. Greenham*, 3 Jur. 576. v. *Jones*, 3 Mer. 161; 7 Price, 663.

(2) Jac. 466; 3 Madd. 1; *cf v. Jones* (3) 9 Sim. 539.

(4) 1 Ves. Sen. 119, 287.

a trustee thereof for his father, and praying that the settlement might be set aside as fraudulent and void as against the creditors of the defendant R. V., and that the trustees might be restrained from selling the residue of the estate (part of which had been sold), and from receiving the purchase-money, and from parting with, or in any way dealing with the trust funds, Vice-Chancellor Sir R. Malins granted an injunction restraining the trustees from dealing with the capital of the property, but not interfering with their application of the income to the trusts of the settlement (1).

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SECT. 32. *Gambling—Gaming.*

1. The Court will not interfere to relieve in respect of a speculative transaction upon the Stock Exchange, where the claim to relief amounts in effect to this, that the plaintiff has been misled by the trick of some fellow-speculators to enter into a transaction which has not turned out so profitably as he expected. The Vice-Chancellor (Sir W. P. Wood) said that this case stood on the same footing as a mere gambling or betting transaction, with which the Court would decline to interfere, leaving such questions to be arranged, as in the case of so-called debts of honour, by those much more competent tribunals, the Jockey Club or the committee of the Stock Exchange. This was a motion on behalf of the plaintiff to restrain the defendants from taking proceedings against the plaintiff to enforce a contract for the sale of shares in a company, and from causing any proceedings to be instituted by or through the committee of the Liverpool Stock Exchange, on the ground, as alleged in the bill, that the plaintiff had been unable to complete his contract for the sale to one of the defendants at a given price, at a given time, in consequence of an alleged scheme entered into by the defendants to raise the price of the shares, so as to make an exorbitant profit (2).

The Court will not relieve in respect of a speculative transaction on the Stock Exchange, where plaintiff has been misled by a trick of fellow-speculators.

2. In *Osbaldiston v. Simpson* (3), securities (promissory notes) given by the plaintiff to prevent a threatened prosecution for (as alleged falsely) cheating at cards, for the penalties for that offence

Promissory notes given to prevent a threatened prosecution

(1) *Gibson v. Head*, 17 W. R. 986.

(2) *Rees v. Fernie*, 13 W. R. 6.

(3) 13 Sim. 513.

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for cheating
at cards,
decreed to be
delivered up.

Bills of
exchange
given for a
gambling
debt, ordered
to be
delivered up.

Equity will
restrain an
innocent
assignee of a
security for
money won in
gaming, from
enforcing his
claim.

under the 9 Ann. c. 14, s. 5, were decreed to be delivered up. The Vice-Chancellor, Sir L. Shadwell, said if B., one of the defendants, could have recovered the penalties at Law, he was at liberty to do so; but that he could not be an arbitrator in his own cause, and determine the amount of the penalty the plaintiff ought to pay for his (B.'s) benefit. And in *Wynne v. Callander* (1) bills of exchange made in France, on French stamps, and substituted in France for English bills of exchange, which were originally given for a gambling debt, were ordered to be delivered up.

3. Equity will restrain an innocent *bonâ fide* assignee for value of a security given for money won in gaming from enforcing his claim, even upon a judgment already obtained, and although the defendant at Law did not resist the suit at Law on that ground (2). And on a bill filed to enjoin a judgment, because the debt was for money won at cards—the evidence leaving it doubtful whether this was the consideration, or, if it was, whether the judgment creditor, an assignee of the debt, had not taken it under a false representation or concealment of the debtor as to the consideration—it was held that the bill should not be dismissed, but that the injunction should be continued, and an issue had to determine the facts (3).

SECT. 33. *Public Policy.*

Where a legal
right exists,
the Court can-
not refuse to
protect it,
upon grounds
of public
policy.

1. Where a legal right exists, the Court cannot refuse to interfere for its protection, upon grounds which depend exclusively on considerations of national policy (4). The Vice-Chancellor, Sir G. J. Turner, in this case, said it was for the Legislature and not for the Courts to deal with questions of national policy, and that the duty of the judge was to administer the law and not to make it; and the Vice-Chancellor granted an injunction against subjects of the kingdom of Holland, to restrain them from using on board their ships, within the dominions of England, without the license of the plaintiffs, an invention to the benefit of which the plaintiffs were exclusively entitled under the Queen's patent.

(1) 1 Russ. 293.

354 (Amr.)

(2) *Gough v. Pratt*, 9 Md. 526
(Amr.)

(4) *Caldwell v. Vanvliessen*, 9
Hare, 415; *v. ante*, pp. 247, 248.

(3) *Nelson v. Armstrong*, 5 Gratt.

2. In *Harrington v. Du-Chatel* (1), a perpetual injunction was granted by Lord Chancellor Thurlow against an action on annuity bonds given for the purchase of an office as a page of the presence at court, upon the public policy of the law, although the office was not within the statute 5 & 6 Edw. 6, and similar to marriage brokerage bonds, where, though the parties are private persons, the practice is publicly detrimental.

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SECT. 34. *Undue Influence.*

1. No person who stands in a relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, unless a sufficient protection has been interposed against the exercise of such influence (2); and Vice-Chancellor Sir J. Stuart, in this case, held that a gift by a person of weak intellect of her whole fortune to a person who had acquired great influence over her mind, by making her and others believe that he sustained a supernatural character, was invalid; and the Court ordered the donee to refund the gift (stock), with interest thereon from the time of the death of the donor, and to pay all the costs of the suit. The Vice-Chancellor said that it was needless to inquire or speculate whether the defendant was himself also the victim of his own imposture; that the most favourable view of his conduct would be that, under the influence of a disordered imagination, he really fancied himself to be such a supernatural being as he made the donor believe; but that, even if it were possible to take this lenient view of the defendant's conduct, when the question was as to the validity of the gift, it was only necessary to shew that it was bestowed under the influence of a delusion. This was a bill by the administrator of the donor to restrain the defendant, the donee, from transferring a sum of stock obtained from the donee by imposing a belief on her that the donee sustained a supernatural character, and for a transfer of the stock.

No person standing in a relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person under the dominion of that influence, unless sufficient protection has been interposed against such influence.

2. Undue influence may exist in the form of bad companionship

Undue influence, sufficient

(1) 1 Bro. C. C. 124.

(2) *Nottidge v. Prince*, 2 Giff. 246; 29 L. J. (Ch.) 857.

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to invalidate a will, must be exercised by coercion or fraud, but actual violence not necessary—the coercion of imaginary terrors is sufficient.

Undue influence cannot be presumed—it must be proved.

A person obtaining a voluntary donation is bound to be ready to prove that the transaction was righteous, the act voluntary and deliberate.

and bad example, but this would not be sufficient to invalidate a will made under its operation. To be within the meaning of the rule of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence, used or threatened, is not necessary to constitute coercion. Imaginary terrors, produced by a person in vigorous health towards one feeble in body, may be sufficient for that purpose, and a will thus made may possibly be described as obtained by coercion. “Undue influence, in order to render a will void, must be influence which can justly be described, by a person looking at the matter judicially, to have caused the execution of a paper pretending to express a testator’s mind, but which really did not express his mind, but expressed something else, something which he did not really mean.” *per* Lord Chancellor Cranworth (1). Undue influence cannot be presumed, but must be proved (2). This was an appeal from the Court of Chancery in Ireland on a bill praying that a will might be declared void as obtained by undue influence, or for an issue *devisavit vel non*; or that the plaintiffs might be at liberty to proceed at Law, by ejectment, for the recovery of premises of which the testator died seised; and that the defendants might be restrained from relying on outstanding tenancies, or any outstanding terms or temporary bars, as a defence against the plaintiffs’ proceedings.

3. Whenever a person obtains by voluntary donation a benefit from another, he is bound, if the transaction be questioned, to prove that the transaction was righteous, and that the donor voluntarily and deliberately did the act, knowing its nature and effect; and this rule is not confined to cases of attorney and client, parent and child, &c., but is general. And where L. F. had requested her nephew, J. L. L., to come and reside with her, and while so doing she had altered her will in his favour, and she subsequently had made several other alterations, and by the last the greater portion of the property she had power to dispose of was given to J. L. L. and his two brothers; and these alterations were made by her own solicitor; and after the last of these alterations she executed a *post-obit* bond for £1500 in favour of J. L. L. and his two brothers, and

(1) *Boyse v. Rossborough*, 6 H. L. C. 2, 34, 49; 3 Jur. (N. S.) 373; 3 Kay, 71; 3 De G. M. & G. 817.

(2) *Id.*

this was done by a solicitor unknown to her, who was employed at her request by J. L. L.; and differences afterwards arose between L. F. and her nephew, J. L. L., who left her house; and L. F. then sent for her own solicitor, and, without taking any notice of the bond, altered her will, and disposed of the whole of her property among other persons, and died, leaving insufficient to pay the bond; and her solicitor, who was one of her executors, upon communicating the decease of the testatrix to J. L. L., was, for the first time, informed of her having executed the bond: upon a bill by the executors to set it aside, the Court held, that the bond was obtained by undue influence and upon a suppression of facts, and that the nephew, J. L. L., not having proved that the aunt knew that the effect of the bond was to make her will irrevocable, the bond was void; and that it must be delivered up to be cancelled, with the costs to be paid by J. L. L. (1).

4. Where A., a widow, aged seventy-five, within a few days after first seeing B., who claimed to be a so-called "spiritual medium," was induced, from a belief that she was fulfilling the wishes of her deceased husband—alleged to be conveyed to her through the medium of B.—to adopt him as her son, and transfer £24,000 of stock to him; to make her will in his favour, and afterwards to give him a further sum of £6000 stock; and also to settle upon him, subject to her life interest, the reversion of a mortgage security for £30,000 (these gifts being made without consideration, and without power of revocation); upon a bill by A. praying a transfer of the consols and an assignment of the mortgage security, and an injunction to restrain any dealings by the defendants with the consols and the mortgage debts, Vice-Chancellor Sir G. M. Giffard held, that the relation proved to have existed between them implied the exercise of dominion and influence by B. over A.'s mind; and, consequently, that as B. had failed to prove that these voluntary gifts were the pure, voluntary, well-understood acts of A.'s mind, they must be set aside (2).

Gifts made through the ascendancy of donee (here) over mind of donor, from her belief in the donee being "a spiritual medium," set aside.

(1) *Cooke v. Lamotte, Lamotte v. Cooke*, 15 Beav. 234; 21 L. J. (Ch.) 371. 451; 16 W. R. 824; *et v. Hatch v. Hatch*, 9 Ves. 292, 296; *Dent v. Bennett*, 4 My. & Cr. 269, 276; *Huguenin v. Baseley*, 14 Ves. 273.

(2) *Lyon v. Home*, L. R. 6 Eq. 655; 37 L. J. (Ch.) 674; 18 L. J. (N. S.)

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SECT. 35. *Arbitrations—Awards.*

Where a submission contains no agreement to make it a rule of Court, neither submission nor award is within statute of Will. 3, and the jurisdiction of Equity remains.

Delay (here) disentitled to set aside award.

1. Upon a bill filed by the plaintiff alleging that he could not obtain justice by the process of Common Law, and praying that the award might be set aside; that all accounts and questions arising out of the dissolved partnership mentioned in the bill might be adjusted and settled by this Court; or, otherwise, that the defendants might be restrained from setting up the award as a defence against the plaintiff's seeking to adjust and settle such questions in the Court of Bankruptcy; and—as stated by the Vice-Chancellor—the question that arose upon the bill was that there being a power to make a submission a rule of a Court of Common Law, the original jurisdiction which this Court entertained up to the statute of Will. 3, of controlling the award (where satisfied that, upon equitable grounds, it ought to be controlled and rectified) had been, in effect, taken away: the Court held that where a submission does not contain an express agreement enabling the parties to make it a rule of Court, neither the submission nor the award is brought within all the consequences or provisions of the 9 & 10 Will. 3, c. 15, by force of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 17); and that the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106, s. 153) had not this effect; and that the jurisdiction of a Court of Equity to set aside the award had not been taken away, but that this jurisdiction will not be exercised without great caution; and, unless gross hardship and injustice would result from a refusal to interfere, the Court will not assist a party who might have obtained relief by taking proper steps at Common Law, but has allowed the opportunity for doing so to lapse; and in such a case the Court of Chancery will follow the course taken by the Courts of Common Law, and adopt a rule of its own in analogy to the limitations of the statute. Therefore, where a plaintiff had suffered the next term after the publication of the award to elapse without taking any steps to set it aside, and had afterwards unsuccessfully pleaded *nul tiel agard* in an action on the award; the Court held, dismissing the bill with costs, that although the award could not have stood if the matter had been fresh, it was too late to interfere (1).

(1) *Smith v. Whitmore*, 1 H. & M. 576; 12 W. R. 244; affirmed on appeal by Lord Justice Knight Bruce, *dis-*
sentiente, Lord Justice Turner, 10 Jur. (N. S.) 1190.

2. The award of an arbitrator finding a damage done by a nuisance is to be treated as a verdict establishing a legal right, so as to entitle the party in whose favour it is made to an injunction (1).

3. Where, under the 8 & 9 Vict. c. 118, the Inclosure Commissioners had made a provisional order, and were proceeding to make their final award, and it was disputed whether the lands intended to be inclosed by them were within the Act, Vice-Chancellor Sir R. T. Kindersley held, that Equity would not interfere to restrain them by injunction from proceeding (2). And in *Bateman v. Boynton* (3), where an award was made in the year 1765 by Inclosure Commissioners, acting under the authority of an Act of Parliament, whereby they apportioned certain lands and a rentcharge between the rectors of B. and curates of U.; and the plaintiff, who was at the time of filing the bill curate of U., by his bill complained that this allotment was beyond the power of the commissioners, and prayed that the award might be rectified, and a fresh partition made; the Lords Justices Sir J. L. Knight Bruce and Sir G. J. Turner held (reversing a decision of the Master of the Rolls, Lord Romilly), that on the true construction of the Act the commissioners had power to make the allotment; but, *semble*, that if they had made a mistake, and had acted *ultrà vires*, this Court would not in such a suit as this, if in any suit, have had power to rectify the award.

4. Where a railway contractor, on the completion of the works, brought an action against the company to recover the balance, and by an order of Court all matters in difference were referred to arbitration with full powers, and the Court was empowered to refer back the award from time to time, and the award was made in July, 1848; and in January, 1850, the company filed this bill, alleging fraud in the performance of the works, practised in collusion with their engineer, and discovered since the award, and seeking to set aside the award, and to have the accounts taken, and praying an injunction to restrain the defendant from issuing any attachment under, or otherwise enforcing, the award, or taking or

(1) *Imperial Gas Light and Coke Company v. Broadbent*, 7 H. L. C. 600.

(2) *Turner v. Blamire*, 1 Drew. 402; 22 L. J. (Ch.) 766.

(3) L. R. 1 Ch. 359; 12 Jur. 383; 35 L. J. (Ch.) 18, 568; 14 W. R. 119, 593; 13 L. T. (N. S.) 487; 14 L. T. (N. S.) 371.

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prosecuting any proceedings under the rule of Court; a general demurrer was allowed, on the ground that the matter was already before another jurisdiction competent to reconsider the matter and decide all questions (1).

5. Where it was one of the terms of an agreement to refer disputes to arbitration, that the submission might be made a rule of Court at Law at the option of either party, and a bill having been filed to set aside the award, and it appeared by the answer of the defendant that the submission had been made a rule of the Court of King's Bench by the defendant subsequently to the filing of the bill, the common injunction which had been obtained by the plaintiff was, upon appeal, dissolved: the Lord Chancellor, Lord Brougham, holding that the Court of Chancery had no jurisdiction in this case to relieve against the award; and that, under the 9 & 10 Will. 3, c. 15 (under and within which statute the Lord Chancellor said this submission was), it was intended to give that Court only in which the submission is made a rule the power of reviewing the award, and this being a submission, not in a cause depending either here or at Law, but by agreement, with the usual power for either party to make the submission a rule of the Court of King's Bench or other Court of Record, and therefore altogether under and within the 9 & 10 Will. 3, c. 15 (2). And where a bill to set aside, and for an injunction to stay proceedings on, an award, on the ground of fraud and corruption in the arbitrator, was filed before the submission had been made a rule of the Court of King's Bench, but the submission was, within due time, made a rule of that Court, it was held that Equity had no jurisdiction, although the award might have been made a rule either of this Court or of the Court of King's Bench (3). And, on an action being referred at *Nisi Prius*, *semble*, the Court of Equity has no jurisdiction to interfere with the certificate of the referee, or the judgment entered in pursuance thereof, on any ground on which it would not have such jurisdiction if the judgment had been obtained in the ordinary course upon the verdict of a jury. The Lord Chancellor, Lord Cottenham, observed, that it (the reference here to an arbi-

(1) *Londonderry and Enniskillen* (2) *Nichols v. Roe*, 3 My. & K. 431;
Railw. Co. v. Leishman, 12 Beav. 423. 5 Sim. 156.

(3) *Dawson v. Sudler*, 1 S. & S. 537.

trator) was only a mode of proceeding at Law, and that this Court had no more jurisdiction over a judgment so obtained than if the amount had been ascertained by a jury (1).

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6. Where an award is made after the submission has been revoked by the plaintiff, Equity will not restrain the defendants from acting on the award, unless the plaintiff had good grounds for revoking the submission. And where, after an agreement to refer to arbitration, the owners of the property revoked their assent to the reference, but the arbitrators, nevertheless, proceeded to make their award, and the owners filed a bill for an injunction to restrain the defendants, the Commissioners of Woods and Forests, acting under powers given them by Act of Parliament (the 1 & 2 Vict. c. 7), from taking possession, but did not shew any good reason for the revocation of their assent, the Court refused an injunction. The Vice-Chancellor, Sir L. Shadwell, said that a plaintiff was not at liberty to ask the aid of a Court of Equity in respect of an act done by him against good faith; and as in this case there was nothing whatever to shew that the power which the plaintiffs had given to the arbitrators was revoked upon any just or reasonable grounds, he was bound to conclude that the revocation was a wanton and capricious exercise of authority on their parts, and consequently the motion must be refused (2).

Where award is made after revocation of submission by plaintiff, defendants will not be restrained acting on the award unless good grounds for revoking award.

7. Where there were objections to the award which might have been equally the subject of jurisdiction in the Court of Law, the reference having been made a rule of the Court of Queen's Bench, this Court dissolved an injunction. But the award being prepared by the solicitor to one of the parties was no objection, nor was it an objection that the reference was not made a rule of Court till after the award (3).

If there are objections to an award which are cognisable by a Court of Law, this Court will not interfere.

8. In *Bowes v. Fernie* (4) an award in pursuance of an agreement of reference, which had been made a rule of Court in the cause, was held bad, and set aside: first, because the arbitrators had awarded on a matter which was not referred to them, and what they had so awarded without authority could not be separated from the other parts of their award; secondly, because they had

Award set aside where not on a matter referred, and arbitrators refused to arbitrate on matters referred.

(1) *Chuck v. Cremer*, 2 Ph. 477.

(3) *Featherstone v. Cooper*, 9 Ves. 67.

(2) *Pope v. Duncannon* (Lord), 9

(4) 4 My. & Cr. 150.

Sim. 177.

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declined to arbitrate upon certain matters included in the reference; although, as observed by Lord Chancellor Cottenham, it is true that the Court leans in favour of awards, and will readily adopt a reasonable construction for the purpose of maintaining their validity.

9. Where, under the then practice, an injunction, for want of an answer, had been obtained to restrain the defendant from all proceedings at Law against the plaintiff on an award for payment of money, and the award having been made a rule of the Court of King's Bench, the defendant applied to that Court for an attachment for non-performance of the award, and obtained a rule to shew cause, this (under the then practice) was not of itself any breach of the injunction; for, in the common case of restraining an action, the injunction of this Court, if no action had been commenced, restrained the defendant from commencing such an action; but if an action had been actually commenced, it permitted the party to go on to trial and judgment, and only restrained the execution. In the present case, therefore, the Lord Chancellor thought that the making the award a rule of Court, which had been done before the injunction, was to be considered as the commencement of the proceeding; and that the defendant might not only obtain a rule to shew cause (as he had done), but might go on to make his rule absolute for the attachment without being guilty of a breach of this injunction, so as he did not execute the attachment (1).

Where, by consent, an order has been made in Chancery to refer to arbitration, no other Court has jurisdiction over the award.

10. Where, by consent, an order has been made in Chancery to refer a suit to arbitration, no other Court has jurisdiction over an award made in pursuance thereof (2).

A parol submission is not within the statute of William & Mary, and either party may recede until the submission is actually made a rule of Court.

11. A parol submission to arbitration was held not within the statute 9 & 10 Will. & Mary, c. 15. The Lord Chancellor, Lord Eldon, said that he had always understood that where an award was to be made a rule of Court, the submission that it should be so must be in writing; and that if there was a parol agreement to make a reference a rule of Court until it was actually made so either party might recede from it; and that the word "insert" in the statute ("insert such their agreement in their submission," &c.)

(1) *Franco v. Franco*, 2 Cox, 420.

(2) *Pitcher v. Rigby*, 9 Price, 79.

must mean an act that infuses that submission into something written (1).

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12. Where a mining lease provided for arbitration in case any controversy should arise relative to the lease, or any covenant, clause, matter, or thing therein contained, or the custom thereof, or any matter, clause, or thing relating thereto; and a bill was filed by the lessors to restrain the lessees from working the mine contrary to the provisions of the lease; and the lessees then appointed arbitrators under the arbitration clause referring to them all matters in dispute, and moved, under the 11th section of the 17 & 18 Vict. c. 125 (the Common Law Procedure Act), to stay proceedings in the suit: the Court held, that the case came within the scope of the 11th section, but that the section gave a discretion to the Court; and that this was a case in which the Court, in the exercise of its discretion, ought not to stay proceedings, on the ground that the notices to refer related to other matters besides those the subject of the suit, and that questions arose in the suit which did not come within the clause in the lease (2).

13. Where, under a submission to arbitration containing no provision for making it a rule of Court, an award was made in June, 1859, finding a sum due from S. to W.; and in December, 1859, W. brought an action on the award; to which S. pleaded *nul tiel award*, and adduced, in support of the plea, evidence that the arbitrators had made their award according to the opinion of a third party, and not their own; and a verdict was found for S., leave being reserved to W. to move to have it entered for him; and in June, 1860, the Court of Exchequer discharged a rule *nisi* which had been obtained for that purpose; but in December, 1861, the Exchequer Chamber reversed this decision, on the ground that the defence was not available by way of plea; and in March, 1862, S. filed a bill to set aside the award, and to be relieved against the judgment:—Vice-Chancellor Sir W. P. Wood held, that as the submission did not contain any agreement that it might be made a rule of Court, and as it never had been made a rule of Court, the Court had jurisdiction; that if the matter had been fresh, the award must be set aside, and the

If the submission to arbitration does not contain an agreement that it may be made a rule of Court, the

(1) — v. *Mills*, 17 Ves. 419; v. Blackstone's Commentaries, vol. iii. p. 17, 16th (Coleridge's) Ed.

(2) *Wheatley v. Westminster Brymbo Coal Company*, 2 Dr. & Sm. 347; 11 Jur. (N. S.) 232.

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Court of Chan-
cery has juris-
diction to set
aside the
award.

Court had still jurisdiction to do so; but that as the plaintiff might have made the submission a rule of Court, and set aside the award at Law on the grounds urged, but had allowed the time for so doing to elapse, the Court of Chancery ought not to interfere, unless in a strong case, and being disposed to the view that the arbitrators had, however irregularly, come to a correct conclusion, dismissed the bill; and on appeal it was held, by Lord Justice Knight Bruce, that the plaintiff must, by his course of conduct, be taken to have elected to defend himself against the award by defending the action, and to abandon all other modes of opposition; that he must therefore abide by the result of the action, and that the bill had been properly dismissed (1). But it was held by Lord Justice Turner, that where a submission to arbitration has not been made a rule of Court, and contains no agreement that it may be made a rule of Court, the jurisdiction of Equity to set aside the award is unaffected by the statutes, and that the plaintiff's conduct had not been such as to debar him of his right to resort to a Court of Equity; that the Court had no jurisdiction to inquire whether the award was right or wrong, and that the plaintiff ought to have had relief, on the ground of the invalidity of the award (2).

14. Upon a motion by the plaintiff to restrain an arbitrator from making an award, and a cross motion by the defendants to stay further proceedings in the suit, Vice-Chancellor Sir W. P. Wood held, that there is no original jurisdiction in the Court of Chancery, in the nature of a writ of prohibition, to restrain an arbitrator from proceeding to make an award, and that the only jurisdiction that exists to stop the proceedings is founded on the conduct of the parties. But the repudiation by a railway company of a contract for the completion of their line, followed by seizure of the works under an order of a colonial Court, was held by the Vice-Chancellor a waiver on their part of the right to proceed by arbitration under the same contract with reference to the question of the legality of the seizure, and all matters involved in, and dependent upon, such question. At the same time, the Common Law Procedure Act had introduced a very wholesome provision—that where there was a reference going on, it should be competent for the Court to stay the pro-

(1) *Smith v. Whitmore*, 2 De G. J. & S. 297.

(2) *Ib.*

ceedings pending the reference (1). But upon an appeal from this order the Lord Chancellor, Lord Cranworth, said that the Vice-Chancellor might have come to a correct conclusion as to the parties having by their conduct excluded themselves from the benefit of their contract to arbitrate; but his Lordship could not see his way to that conclusion until the cause was heard, but that it was, however, quite clear that the Legislature never intended that, where a reference and a suit were going on together, the Court should not have power to stay proceedings; and the order finally made was to discharge the order of the Vice-Chancellor—both motions to stand over, with liberty to apply, and the reference to go on, the defendants undertaking not to take any proceedings upon any award without the leave of the Court (2).

15. Where by a contract between a railway company and a contractor, it was provided that if the contractor made default the company might complete the line, and that the plant upon the line belonging to the contractor should become the property of the company, and be set off against the debts (if any) due from him to the company, and that the contractor should not hinder the company from using the same; and default having been made, the company completed the line, and was proceeding to remove the plant, and an arbitration was pending to decide the questions of account between the contractor and the company; the Court held, that the company must be enjoined from removing the plant before the award was given (3).

16. The power to revoke, without the leave of a Court, a submission to arbitration which does not contain a consent clause for making the submission a rule of Court, is not affected by the Common Law Procedure Act, 1854. And where A. and B., having dissolved partnership, signed an agreement by which, after stating that B. had offered A. £18,000 for the purchase of his interest in the partnership business and assets, and that A. had declined the offer, but was willing to accept £20,000, they agreed to leave it to a referee to say what sum should be paid by B. to A.; Vice-Chancellor Sir R. Malins held—upon a motion on behalf of the plaintiff, in a suit for the dissolution of the partnership between

The power to revoke a submission to arbitration, where there is no clause for making the submission a rule of Court, is not affected by the Common Law Procedure Act, 1854.

(1) *Pickering v. Cape Town Railw. Co.*, L. R. 1 Eq. 84.

(3) *Garrett v. Salisbury and Dorset Junction Railw. Co.*, 12 Jur. (N.S.) 495.

(2) *Ib.*

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the plaintiff and the defendants, for an injunction to restrain the defendants from drawing, &c. bills, or entering into guarantees, or executing securities in the name of the firm, and from receiving the partnership assets, and from carrying on their own business on the partnership premises, and for the appointment of a receiver of the partnership assets—that the authority of the arbitrator was restricted to awarding a sum not less than £18,000, nor greater than £20,000, and that the agreement was revocable by either party at any time before the award was made, and had been revoked by the plaintiff, and that therefore the terms of the dissolution were not ascertained, and that the accounts of the partnership would have to be taken when the case was brought to a hearing (1).

Award by an engineer of company set aside (here) at suit of contractors.

17. Where contractors on a railroad agreed with the company to refer all disputes and differences to the engineer of the company, whose decision should be conclusive and without appeal, and the engineer was a stockholder to the amount of ten thousand dollars, which was unknown to the contractors at the time of making the agreement; the Court held, on a bill filed by the contractors, that Equity might set aside the award, and order an account for their damages by breach of the contract (2).

SECT. 36. *Interpleader Suits.*

1. Where a sheriff's officer had notice at the time of the seizure under a *fi. fa.*, that the goods seized were not the goods of the person against whom the writ issued, but belonged to another person, who threatened to take proceedings at Law to recover them, and the sheriff filed a bill to restrain the proceedings, and for interpleader; upon a motion for an injunction, Vice-Chancellor Sir R. T. Kindersley, without deciding whether the sheriff could file a bill of interpleader, held that it behoved the sheriff to satisfy the Court that there is good ground for supposing that the goods the subject of the seizure were the goods of the party (*i.e.* the party

A sheriff, on filing an interpleader bill, must shew there was good ground for supposing the goods

(1) *Thomson v. Anderson*, L. R. 9 Eq. 528; 39 L. J. (Ch.) 468; 18 W. R. 445; 22 L. T. (N. S.) 570. (2) *Milnor v. Georgia, &c.*, 4 Ga. 385 (Amr.)

whose goods were seized); and the plaintiff not having done this by his bill, and not having used due diligence in filing the bill (the bill was not filed until three weeks after the seizure), that the motion must be refused with costs (1). But as to the right of a sheriff who had seized goods to file a bill of interpleader, the Master of the Rolls, Sir J. Romilly—upon a bill by a sheriff who had seized certain goods belonging to a railway contractor under a *fi. fa.* which had been issued against the railway company, and the contractor claimed the goods seized as his own, and the sheriff then filed a bill to restrain proceedings at Law threatened by the contractor, and for interpleader, without giving notice to the judgment creditor of the contractor's claim—held that, having regard to the then late decisions, he did not think he could hold that the sheriff was in no case entitled to file a bill of interpleader, but that it was clear that in the present case the sheriff had put himself in the wrong, and must pay the costs of the suit. The sheriff had neglected, first, to acquaint the creditor with the adverse claim, in order to give him an opportunity of withdrawing his claim before the bill was filed, and the creditor, upon being informed of the contractor's counter claim, abandoned his own, but the sheriff still claimed to be dismissed with costs (2). In *Smith v. Craig* (3) it was held that a claimant under a bill of sale must give the execution creditor an opportunity of examining his claim before requiring the execution creditor to say if he will accept an issue.

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seized were
the goods of
the execution
debtor.

It cannot be
said that a
sheriff is in no
case entitled
to file a bill of
interpleader.

2. Where the husband of a married woman had mortgaged a legacy belonging to his wife, which was charged upon land, with powers of distress and entry, and by the receipts of the rents, or demise, sale, or mortgage, to raise the same, and the mortgagees threatened to take proceedings at Law to recover the legacy; upon a bill by the wife by her next friend, praying that the legacy might be raised by a sale or mortgage, and for a settlement thereof, or a competent part, upon herself and children, and that the defendant G., the owner of the devised land charged with the legacy, might be at liberty to pay into Court to the credit of the cause

(2) *Tufton v. Harding*, 6 Jur. (N. S.) 116; 29 L. J. (Ch.) 225. (3) *Dutton v. Furness*, 12 Jur. (N. S.) 386.

(3) 16 Ir. Ch. Rep. App. v.

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the legacy and interest, and that the mortgagees (other defendants) upon such payment might be restrained from taking proceedings for the recovery of the legacy; the Master of the Rolls, Sir J. Romilly, held that the owner of the land charged was entitled to pay the money into Court, and protect himself from being vexed by double proceedings; and that upon payment of the money into Court, an injunction must go to restrain the action which it was stated the trustees had commenced to obtain possession of the land, the costs of the motion being costs in the cause (1).

3. In *Blennerhassett v. Scanlan* (2), it was held that on the dismissal of a bill of interpleader, the plaintiff is entitled to be paid back the money which he lodged in Court for the purpose of obtaining an injunction; and that the injunction falls, *ipso facto*, without an order for the purpose, though it was the general practice to apply for an order to dissolve it.

A tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger.

4. A tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger, under a title adverse to that of the landlord; and on suspicion of collusion (here), an inquiry into the circumstances was directed, and the report confirming the fraud, the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor—the latter to shew cause why he should not be struck off the rolls. The Lord Chancellor said: “A bill of interpleader will lie, where the tenant may be liable to pay the rent to one of two different persons. In the circumstances of that case both the persons claiming the same rent must claim in privity of tenure and privity of contract; as in the case of mortgagor and mortgagee, trustee and *cestui que trust*; or where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in receipt of the rent, and differences arise between them, and she claims the rent. There may be a variety of cases in which the tenant, not disputing the title of the landlord, but affirming that title, the tenure, and the contract by which the rent is payable, but where it is uncertain to whom it is to be paid, may file a bill of interpleader. In a case before me

But tenant may file a bill of interpleader where there is privity of tenure and contract between both the persons claiming the rent.

(1) *Duncombe v. Greenacre*, 6 Jur. (N. S.) 987; 8 W. R. 657.

(2) 1 Hog, 363.

the other day, where there was a mortgage, the tenant was not bound to settle the account between the mortgagor and mortgagee. If the mortgagor will not indemnify the tenant, he has a right to come here for an indemnity" (1). And so in *Cowan v. Williams* (2) it was held that a tenant may file an interpleader bill against his landlord where the question arises on the act of the landlord subsequent to the lease. This was a case of a bill of interpleader by a lessee of tithes against the lessor, the vicar, and the assignees under an Insolvent Act, of which he took the benefit subsequent to the lease, both claiming the rent; and the Lord Chancellor (Lord Eldon) sustained the bill.

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A tenant may file interpleader bill where the question arises on an act of landlord subsequent to the lease.

5. Where one claimant seeks a certain rent from the tenant in possession, and the other unliquidated damages for use and occupation, he cannot make them interplead (3).

6. Where L., the agent at Belfast for the owner of a ship chartered to that port, had acquired equitable charges on the freight and cargo, and was also agent for the charterers and consignees; and on the arrival of the vessel at Belfast possession was taken by L., and the cargo was landed and stored with the Belfast Harbour Commissioners, wharfingers, in L.'s name; and after the landing of the cargo the Marine Investment Company, who claimed to be assignees of the ship under a bill of sale, served a notice on the Harbour Commissioners (purporting to be a notice under 25 & 26 Vict. c. 63, s. 68, the Merchant Shipping Act Amendment Act 1862), cautioning them against allowing the cargo to be removed from their wharves or warehouses until the lien for freight claimed by the company had been discharged; and the Harbour Commissioners having thereupon refused to deliver any portion of the cargo to L., an action for the recovery of the cargo was brought against them by L., in the Court of Common Pleas in Ireland, and an application for an interpleader was made to the Court of Common Pleas by the Harbour Commissioners; and on a motion to shew cause, the Court differing in opinion, no rule was made on the motion, and an interpleader suit in Chancery was then com-

(1) *Dungey v. Angove*, 2 Ves. Jun. 304, 2nd Ed.; 3 Bro. C. C. 36; *et v. Smith v. Target*, 2 Anstr. 529; *Johnson v. Atkinson*, 3 Anstr. 798.

(2) 9 Ves. 107.

(3) *Johnson v. Atkinson*, 3 Anstr. 798.

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menced; upon a motion for an injunction to stay the proceedings at Law, the Court held, that the case was properly the subject for an interpleader suit, notwithstanding the provisions of the 25 & 26 Vict. c. 63, and that the jurisdiction of the Court of Chancery was not affected by the decision of the Court of Common Pleas (1).

7. Where a suit had been instituted in the Court of Admiralty, by arrest of a ship, on behalf of a person claiming to be the owner of goods, on the ground of breach of duty on the part of the master in not delivering the goods to him, and a like proceeding had been instituted in the same Court, by another claimant, in respect of the same goods; Vice-Chancellor Sir W. P. Wood, upon a motion on behalf of the plaintiff to restrain further proceedings, said that he very much doubted whether in such a state of things as arose from the above circumstances a question of interpleader would arise as regards the captain of the ship, on the ground that the proceedings were not against him but against the ship—that is to say, the loss would fall upon the owners of the ship; and that the Court of Admiralty had jurisdiction to decide the whole question; the Vice-Chancellor said, upon the whole, he thought it was not a case for interpleader, and refused the motion with costs (2).

Proceedings in one suit in Equity restrained by an injunction obtained in another and interpleader suit.

8. Proceedings in one suit (in this case not an interpleader suit) in Equity were restrained by an injunction obtained in another suit, being an interpleader suit; and where there are two claimants to a fund, and one files a bill against the stakeholder without making the other a party, the stakeholder may file an interpleader bill, and restrain the proceedings in the former suit; and so he may obtain in the interpleader suit an injunction extending as well to the prior proceedings in Equity as to proceedings at Law (3); and in *Warrington v. Wheatstone* (4), it was also held that it is no objection to an interpleading bill that a suit (here also not an interpleader suit) by one of the claimants of the fund is pending.

9. In case of a sale by auction, if both parties claim the deposit, the auctioneer may file a bill of interpleader, and pray for an

(1) *Belfast Harbour Commissioners v. Lawther*, 16 Ir. Ch. Rep. 34.

(2) *Sablicich v. Russell*, L. R. 2 Eq. 441; 14 W. R. 913.

(3) *Prudential Assurance Company v. Thomas*, L. R. 3 Ch. 74; 37 L. J. (Ch.) 202; 16 W. R. 470.

(4) Jac. 202.

injunction, which will be granted upon payment of the deposit into Court (1).

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10. The plaintiff's affidavit of "no collusion" in an interpleader suit cannot be rebutted before the hearing by a counter affidavit; and the plaintiff is entitled, notwithstanding such counter affidavit, to an order for payment of the money into Court, and for an injunction; and the plaintiff's right to this protection is not lost by his filing additional affidavits to verify the statements in the bill.

The plaintiff's affidavit of no "collusion" in an interpleader suit, cannot be rebutted before the hearing.

But in a case where a charge of collusion was made, the Court put the plaintiff under an undertaking as to damages, and the Lords Justices Selwyn and Giffard reversed an order of Vice-Chancellor Malins, made upon such counter affidavit. This was an interpleader suit against H. J. R. and W. S. W., stating that previously to June, 1866, the plaintiff had employed the defendants, and their partner G. F. R., as his solicitors; and that the bill of costs due from him to them had been taxed under an order of the Master of the Rolls at the sum of £570 5s. 7d.; and that each of the two defendants claimed the amount due, but that G. F. R. made no claim to it; and prayed that the two defendants might interplead, and might be restrained from suing him for the amount due; the bill was accompanied by the usual affidavit of the plaintiff, that there was no collusion between him and either of the defendants; after the defendants to the bill had appeared, the plaintiff, on the 9th of February, 1869, moved for leave to pay the sum of £570 5s. 7d. into Court, and for an injunction in the terms of the prayer; this motion was supported by an affidavit by the plaintiff, verifying the facts stated in the bill; the defendant W. filed an affidavit in answer, stating that the plaintiff was acting in collusion; and the Vice-Chancellor, on reading these affidavits, refused the motion (2).

11. The owner of lands subject to a charge is entitled to file a bill against persons setting up conflicting claims to the benefit of the charge, to have their rights declared, and the estate discharged, on payment of the money charged; and such a bill is not a bill of interpleader, so as to require an affidavit of "no collusion" (3).

Owner of lands charged may file a bill to settle conflicting claims.

12. To obtain an injunction against a judgment, on the ground

Where there are several

(1) *Farebrother v. Prattent*, 5 Price, (N. S.) 385; 17 W. R. 479. 303.

(3) *Vyvyan v. Vyvyan*, 4 De G. F.

(2) *Manby v. Robinson*, L. R. 4 Ch. & J. 183. 347; 38 L. J. (Ch.) 309; 20 L. T.

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claimants a bill of interpleader may be filed for an injunction against a judgment.

that the complainant cannot safely pay it, there being several claimants, he should file a bill of interpleader, and pay the debt into Court for the party shewing himself entitled thereto (1).

SECT. 37. *Prerogatives of the Crown.*

1. Where, upon an information on behalf of the Crown, praying for a declaration that the defendants M. had not any right or title to grant gales or leases within any part of the Forest of Dean, or to exact gale fees or rents in respect thereof, and that they might be restrained from making or granting any more such grants or leases; and that the defendant Morse (a galee or licensee of M.) might be restrained from continuing the quarry (which had been galed to him by M.), and for an account; the defendants M. claimed, as owners in fee of a manor which was without the limits of the Forest of Dean, that the office of woodwards or foresters of B. Walk within the forest was annexed to the ownership of the manor; and that, as such woodwards or foresters, they had a right to grant to persons called "free miners" gales or licenses for working stone within B. Walk, and to take gale rents, and apply them to their (the defendants') own purposes, without accounting to the Crown; and the soil of B. Walk was in the Crown; Vice-Chancellor Sir W. P. Wood held, that such a right could not be maintained, unless it was shewn that the grantees of the gales or licenses had a capacity to accept the same; and that the 1 & 2 Vict. c. 43 extinguished the rights and capacities of the free miners; and, further, that the office of woodward, or forester of the Crown, even if grantable by the Crown in gross, could not have been assigned to a third person by any such grantee without a license from the Crown, founded on a return to a writ of *ad quod damnum*, being an office of trust; and, *semble*, that such an office could not be annexed to a manor (2), so as to pass to every one who, as grantee, devisee, or assignee, might become entitled to the manor; and that, even independently of the operation of the 1 & 2 Vict. c. 43, upon the alleged rights of the free miners, no right could ever

(1) *Fowler v. Lee*, 10 Gill. & J. 358 (Amr.)

(2) 4 Inst. 315, 316

have been established by any custom, however ancient, uniform, and clear, to the exercise of the custom as now claimed by the defendants—viz., a right in one person to enter upon the soil of another person, and carry away portions of it; neither can such a right be established by prescription, nor by any assumption of a lost grant; and a claim which is radically bad in itself cannot be substantiated by any Statutes of Limitation; and the Vice-Chancellor made the declaration and granted the injunction prayed for (1).

2. Foreigners in this country, as well as British subjects, are liable to actions for the injury done by their infringing upon the sole and exclusive right granted by the Crown to patentees of inventions, in conformity with the law and constitution of this country; and the powers of the Court of Equity, which are founded on the insufficiency of the legal remedy, must be enforced against them, as well as against British subjects; and, therefore, in *Caldwell v. Vanvliessengen* (2) the Court granted an injunction against subjects of the kingdom of Holland, to restrain them from using on board their ships, within the dominions of England, without the licence of the plaintiffs, an invention to the benefit of which the plaintiffs were exclusively entitled under the Queen's patent. The Vice-Chancellor said that the prohibitory words of the patent (which, it was said, were addressed only to the subjects of the Crown) are in aid of the grant, and not in derogation of it; and further ruled that, where a legal right exists, the Court cannot refuse to interfere for its protection upon grounds which depend exclusively on considerations of national policy; and that it is for the Legislature, and not for the Courts, to deal with that question (3).

(1) *Att.-Gen. v. Mathias*, 4 K. & J. 579; 4 Jur. (N. S.) 628.

(2) 9 Hare, 415; *v. S. C.* pp. 247, 248, *ante*; and the 15 & 16 Vict. c. 83, also cited there.

(3) *Vide Brown v. Duchesne*, 19 How. 183, 198 (Amr.). In this case it was held by the Supreme Court of the United States, affirming a judgment of the Circuit Court of the United States for the district of Massachusetts—after

referring to the case of *Caldwell v. Vanvliessengen* (*supra*), and observing that it was not for that Court to question the correctness of the decision, and that that Court must interpret the patent laws of the United States with reference to their own constitution and laws and judicial decisions—that the rights of property and exclusive use granted to a patentee did not extend to a foreign vessel lawfully entering one of the ports

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3. In *Smith v. Earl of Stair* (1) the officers of state in Scotland obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the seashore; but the suit being instituted by them solely to protect the public right, although the judgment of the Court below, upon being appealed against, was affirmed, yet it was affirmed without costs.

4. In *Whitehouse v. Partridge* (2), Lord Chancellor Eldon said, that he recollected no instance of an injunction against an extent.

A grant by the Crown to the inhabitants of a parish is good, but not a grant by a private individual. Grants by the Crown in derogation of forestal rights, are good. A grant by the Crown to the poor of a parish to cut wood on waste lands in a royal forest, is good.

5. A grant made by the Crown to the inhabitants of a parish is good, though such grant cannot be made by private individuals. And grants by the Crown in derogation of forestal rights are good grants, though they would not be good except in derogation of such rights. And the Master of the Rolls, Lord Romilly, overruled a demurrer to a bill by the poor of a parish, claiming a right by grant from the Crown to cut wood on waste lands within a royal forest for their own use, and for sale to the other inhabitants of the parish; but, *semble*, such a claim would be bad if alleged on the ground of prescription or custom, or of a grant from a private individual. This was a case of a grant by the Crown to the inhabitants of Loughton, which was a Crown manor and parish within the royal Forest of Waltham, Essex, that the labouring or poor people inhabiting the parish, and having families, might, during a certain period of every year, cut or lop the boughs and branches above seven feet from the ground on the trees growing on the waste lands of the manor and parish of Loughton, for their own use and consumption, and for sale, for their own relief, to all or any of the inhabitants, for their consumption within the parish as fuel; and the Master of the Rolls held, that this was a valid grant. The bill prayed that the plaintiff and the other labouring or poor people inhabiting the parish of Loughton, and having families, might be declared entitled to the right granted by the charter; that the defendants might be restrained from fencing in,

Prayer of bill to restrain enclosing, &c. lands subject to such right.

of the United States; and that the use of such improvement in the construction, fitting-out, and equipment of such vessel, while she is coming in or going out of a port of the United States, is not an infringement of the rights of an

American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs.

(1) 2 H. L. C. 807; 13 Jur. 713.

(2) 3 Sw. 376.

or inclosing, or suffering to remain fenced in or inclosed, any part of the lands subject to the said right, and from cutting down the trees growing thereon, and from otherwise interfering with the exercise of the right; that the title of the plaintiff and the other inhabitants to the right claimed might be ascertained by the trial of issues, or in such other manner as the Court should think fit, and that they might be quieted in the enjoyment thereof; and that the defendants might account for the profits derived from cutting down the timber in derogation of the rights of the inhabitants (1).

(1) *Willingale v. Maitland*, L. R. 3 Eq. 103; 12 Jur. (N. S.) 932.

CHAPTER IV.

PERSONS AND RELATING TO PERSONS.

PART I.

SECT. 1. *Creditors—Debtors.*

1. In *Knight v. Burgess* (1) the Court refused an injunction to restrain the obstructing assignees under a trust deed for the benefit of creditors, from carrying on an agreement to build entered into by their assignors, who were builders, conceiving that the contract was so framed as to render the personal skill of the assignors a material portion thereof.

2. Where a question of appropriation and apportionment of payments could have been raised by way of defence to an action, and dealt with at Common Law, Vice-Chancellor Sir W. P. Wood allowed a demurrer for want of equity (2). In this case A., a railway contractor, had undertaken to construct the line of a railway company, L., and to provide the necessary funds and act as paymaster; he was also employed to construct the lines of several other railway companies, all forming part of the same railway system; and he employed B. as engineer, and paid him various sums, so as, according to the allegation, fully to satisfy the debt due from the company L., and with knowledge by B. that the payments were made with the moneys of L., and for the specific purpose of discharging their debt; but B., however, claimed the right to appropriate the payments to the debts due from the other companies, for whom also he had been employed by A. to act as engineer, and brought an action against company L. for the whole amount of their debt; and company L. thereupon filed a bill

(1) 10 Jur. (N. S.) 166; 33 L. J. (Ch.) 727; 10 L. T. (N. S.) 90; v. S. C. (2) *Aberystwith and Welsh Coast Railw. Co. v. Piercy*, 12 W. R. 1000. p. 204, *ante*.

against B., the other railway companies, and A., for a declaration that B. was not at liberty to appropriate the payments made to him so as to attribute no part of them to the debt of L.; also asking for an apportionment and an account between the several companies, and for an injunction to restrain B.'s action; the Vice-Chancellor also held, that the bill was demurrable for multifariousness, as the several companies had been improperly made parties to a suit arising out of a dispute as to the amount paid for work and labour between company L. and the person employed by them.

3. Where the Court held, that the effect of an agreement to hypothecate was a forbearance on the part of the creditor, it overruled a demurrer to a bill by a creditor asking for a declaration that there was a lien on the goods for their delivery, and for an injunction and a receiver (1). In this case a creditor demanding security for a debt, the debtor had agreed by letter to hypothecate certain bales of goods in the docks, but subsequently, under advice, refused to deliver the warrants; whereupon the creditor, a bank, filed their bill, praying for an account, and that the plaintiffs might be declared to have a lien on the goods mentioned in the letter or memorandum of a certain date, and on the proceeds of such as had been sold, for the amount which should be found due on taking the account, with the costs of the suit; and for delivery of the warrants and goods; and for an injunction to restrain the defendants from parting with, or disposing of, or authorizing the delivery of, to any other person than the plaintiffs, the warrants and other documents relating to the title of the goods; and from selling the said goods, or receiving the proceeds; and, if necessary, for a receiver. The Vice-Chancellor, Sir R. T. Kindersley, said, "that it had been justly contended that there was no promise by the plaintiffs that they would, for a day or an hour, abstain from doing that which they no doubt might have done, viz., bring an action. There was the demand and the promise only, and that was perfectly true. The question was, whether it was necessary that there should be such a promise in order to make what took place a sufficient consideration?" And that it appeared to his Honour, that when a creditor demanded payment of his debt, and

(1) *Alliance Bank v. Broom*, 13 W. R. 127.

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in consequence of that application the debtor agreed to give certain security, although there was no promise by the creditor to abstain for any given time, the effect of that was, that the creditor did, in fact, give, and the debtor did, in fact, receive, the benefit of some degree of forbearance, although for no definite or specified period; that it was true that at any time, notwithstanding that promise, the creditor might, if he pleased, insist upon immediate payment, and bring an action, even after the security had been given; but the very *res gestæ* and circumstances did necessarily imply and involve the acquisition, on the part of the debtor, of a certain degree of forbearance, which he would not have derived if he had not given the agreement for the security; and that, on these grounds, the demurrer must be overruled in the usual way.

4. Where P. owed a sum to C., which under a letter of license was payable by instalments, subject to a proviso enabling C. to sue for the whole sum at once on failure in punctual payment of any instalment; and C. assigned this debt to the plaintiff, who afterwards gave notice to P., and called upon him to pay the instalments to him; and C. thereupon told P. that the assignment was invalid, and that if P. did not continue to pay to him, C., he would, under the proviso, determine the letter of license: upon a bill by the plaintiff praying an account of what was due, payment of the instalments, and an injunction to restrain P. from paying them to C., Vice-Chancellor Sir W. P. Wood held, that P. was justified in continuing to pay C. until the plaintiff had obtained an injunction, and that he was entitled to retain his costs of the suit out of the future instalments payable to the plaintiff (1).

5. If a creditor has a suit at law upon the estate of his debtor, and a considerable demand upon the same estate, and the debtor or his representative will come into a Court of Equity for its aid to strip the creditor of his legal advantage, the Court will not interpose, unless the party applying will discharge the whole of the creditors' demands, legal and equitable (2).

6. In *Izard v. Colbron* (3), the Court refused an injunction, or

(1) *Aplin v. Cates*, 30 L. J. (Ch.) 6; (2) *Barnewall v. Barnewall*, 3 Ridg. P. C. 75.

9 W. R. 92.

(3) M'Cle. 181; 13 Price, 327.

bill and affidavit charging breaches of trust, to a debtor, to restrain trustees from acting under a trust deed, executed by him for the benefit of them and other creditors, their answer not having been put in or called for.

7. Where there was a trust deed for payment of creditors, no creditor being a party to the deed, nor was it made by agreement with any creditor, and without any release or other consideration moving from any creditor; and the debtor afterwards executed other deeds, varying the trusts of the first deed; a father, in this case, having conveyed his estates to trustees for paying off annuities granted by his son, together with the arrears, and also the son's debts, if they thought proper to pay them, remainder to himself for life, remainder to his son in fee; the annuities being mentioned in a schedule, but the annuitants were not parties to the deed; and the father and son then executed other deeds, varying the former trusts; a motion by one of the scheduled creditors to restrain the trustees from executing the trusts of the subsequent deeds until they had raised money to answer, and had performed the trusts of the first, was refused by Lord Chancellor Eldon on hearing the motion only, without hearing the other side; on the ground that, the trust being voluntary, the Court would not enforce it against the authors of the trust, who might vary it as they pleased (1). And in *Garrard v. Lord Lauderdale* (2) it was held, by Vice-Chancellor Sir L. Shadwell, that a conveyance by a debtor to trustees for payment of scheduled creditors, who do not execute the deed or conform to its terms, cannot be enforced by the creditors. The Vice-Chancellor, in his judgment, said: "The question in this case is similar to that which arose in the case of *Wallwyn v. Coutts* (3); and I have obtained the bill that was filed in that cause; and I have also procured from the registrar's book a copy of the order made in that case. Now the question is, what is fairly to be inferred from that order? And, having had an opportunity of considering this since the motion was mentioned to me, it appears to me that the principle on which Lord Eldon acted when he pronounced that order, must be taken to be consistent with that which he has repeatedly declared to be the

(1) *Wallwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; *Ib.* 1, n.

(2) 3 Sim. 1.

(3) 3 Mer. 707; 3 Sim. 14.

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established law of this Court: namely, that where there is an actual settlement made for vesting an estate in trustees, or for vesting stock in trustees for volunteers, there, the legal character being complete, the persons who have the legal character are trustees for the volunteers, who may claim as *cestuis que trust* against the trustees under the deed. I apprehend that the principle of the two decisions in *Ellison v. Ellison* (1), and *Pulvertoft v. Pulvertoft* (2), and of this in *Wallwyn v. Coutts*, are reconcilable with each other; because I apprehend that Lord Eldon must have considered that where a person does, without the privity of any one, without receiving consideration, and without notice to any creditor, himself make a disposition as between himself and trustees, for the payment of his debts, he is merely directing the mode in which his own property shall be applied for his own benefit, and that the general creditors, or the creditors named in the schedule, are merely persons named there for the purpose of shewing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers. Now, it is manifest that my Lord Eldon must have proceeded on this principle, for he must have considered that the first deed was a voluntary deed for the benefit of the Marquis of Blandford; and he must also have considered that, as under that deed the Marquis had become tenant in fee in remainder of the estates, he was, when he executed the two subsequent deeds, dealing with his own property for his own personal benefit and accommodation, in paying his creditors as he thought proper. Now it appears to me that that is a broad intelligible ground of decision, the principle of which reconciles the decision in *Wallwyn v. Coutts* with the decisions in *Pulvertoft v. Pulvertoft* and *Ellison v. Ellison*."

8. Where a creditor who had proved a debt and received dividends under the Indian Insolvent Act (9 Geo. 4, c. 73), afterwards instituted proceedings for payment out of an estate in Java which did not pass to the insolvent assignees, and also instituted proceedings against debtors of the insolvent at Bencoolen, which did pass to his assignees, an injunction to stay the receipt of further dividends till he abandoned the latter proceedings was granted; but as the estate at Java did not form any part of the fund available for the

(1) 6 Ves. 656.

(2) 18 Ves. 84.

benefit of the general creditors, the creditor was not bound to refund the dividends, nor ought to be prevented from receiving any future dividends, provided he did not receive more than 20s. in the pound upon his whole debt (1).

9. In *Green v. Pledger* (2) it was held, by Vice-Chancellor Sir J. Wigram, that the Court having interfered by injunction to restrain the payment of a legal debt, admitted by the debtor to be due to the nominal creditor, has then jurisdiction to decree payment of the debt against the debtor without sending the party entitled to the payment to recover it by the use at Law of the name of the nominal creditor.

10. In *Wood v. Barker* (3), a bargain by which a creditor who, in consideration of his being a surety for the payment to the other creditors of a composition, agreed with the debtor, but without the knowledge of the other creditors, for the payment of his own debts in full, was set aside by Vice-Chancellor Sir J. Stuart at the instance of the debtor; and the costs of the suit were directed to be paid by the creditor, upon the ground that a statement in his answer that it was not until after the composition deed had been signed by the other creditors that he agreed to become surety was untrue; the composition deed containing a recital that he had been named and agreed to become surety, and approved of as such by the other creditors. This was a bill filed by a party who had compounded with his creditors for 8s. in the pound, and whose bankruptcy had been annulled, for an account of the dealings and transactions of the defendant with the plaintiff since the date of the composition deed; and asking for a declaration that "the defendant was not entitled to credit, in account with the plaintiff, to any further sum than a composition of 8s. in the pound in respect of the debt due from the plaintiff to the defendant at the time of the plaintiff's bankruptcy; and that the defendant might be restrained from selling the unsold goods of the plaintiff without his consent, which goods had been delivered to the defendant for the purpose of sale, and for the purpose of deducting (after payment of the composition to the creditors) from the produce moneys thereof paid on the

(1) *Cockerell v. Dickens*, 3 Moo. P. C. 98; 1 M. D. & De G. 45.

(3) L. R. 1 Eq. 139; 35 L. J. (Ch.) 276; 11 Jur. (N. S.) 905; 14 W. R. 47; 13 L. T. (N. S.) 318.

(2) 3 Hare, 165.

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plaintiff's behalf, two bills of exchange given to the defendant by the plaintiff, which represented the entire debt due to the defendant. Vice-Chancellor Sir J. Stuart said, that upon the principle laid down by Lord Eldon in the case of *Jackman v. Mitchell* (1), it was impossible that that transaction could stand, and that there must be a decree for an account, and a declaration that the defendant was not to be allowed in account more than the other creditors—8s. in the pound. In *Jackman v. Mitchell* (2), a bond to secure to one creditor the deficiency of a composition, not communicated to the other creditors, was decreed to be delivered up with costs, though to *particeps criminis*; as in these cases which proceed upon grounds of public policy the relief is given on account not of the individual, but of the public.

11. Where a judgment creditor of an intestate has obtained a garnishee order, under the 17 & 18 Vict. c. 125, s. 61, against a debtor to the estate, before a decree in an administration suit, he cannot be restrained from enforcing such order (3).

12. Where a creditors' bill alleges the fraudulent execution of a bond by the defendant, upon which he is about to confess a judgment in fraud of creditors, an action on the bond will be enjoined; but the claim must be distinctly stated, and proper exhibits must accompany the bill (4). So, attaching creditors of an insolvent may, before judgment, enjoin an execution against the property attached under a judgment alleged to be fraudulent; all the material allegations, except the fraud, being admitted (5).

SECT. 2. *Principal and Surety.*

1. A surety who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his (6). In this

(1) 13 Ves. 581.

(2) *Ante*.

(3) *Barnes, In re, Harper v. Barnes*,
36 L. J. (Ch.) 63; 15 L. T. (N. S.) 312.

(4) *Mahaney v. Lazier*, 16 Md. 69

(Amr.)

(5) *Heyneman v. Danneberg*, 6 Cal.
376 (Amr.)

(6) *Cooper v. Evans*, L. R. 4 Eq. 45; 15 W. R. 609.

case Cooper; the surety, on the abovenamed ground, filed a bill to restrain execution upon a judgment which had been recovered on the bond; the Master of the Rolls, Lord Romilly, said that, besides the principle above adverted to, it was laid down in a long series of cases, that the doctrines relating to principal and surety were the same at Law and in Equity, and that here the very case which the plaintiff had set up in Equity had been raised at Law, and that it had been held the plaintiff was properly liable, and he dismissed the bill with costs.

2. Where B. was hired as clerk to A. & Co., but no time was fixed for the continuance of the service, but it was to be determinable at the option of either party; and C. and D. joined with him in a bond to secure his duly accounting for his receipts; and C., one of the sureties, died, and his executrix gave written notice to A. & Co. that she would no longer consider herself liable on the bond; and A. & Co. communicated this notice to B., and required and obtained from him a new bond with another surety; and D. died, and also the new surety; and four years and a half after the death of C., B., the principal, died, when deficiencies were found in his accounts subsequent to the notice; the Court held, that the executrix of C. had no equity to restrain A. & Co. from proceeding at Law on the bond, and dissolved an injunction obtained as of course by the executrix. The Vice-Chancellor said that by the original contract the liability of the surety was to continue as long as A. & Co. kept B., or he chose to remain, in their service; that after A. & Co. had received the plaintiff's letter they never gave her any intimation that they did not consider her as continuing liable under her husband C.'s bond, and that their conduct did not operate in any manner upon her. And Lord Chancellor Lyndhurst, upon appeal, said that if the executrix had a right to say, "I will not be liable any longer," and if the notice which she gave to A. & Co. put an end to her liability, that defence was as available at Law as in Equity; and that there was nothing to shew that the obligees acquiesced in the wish of the executrix to be released; that there was no ground on which the Court could say, that when the second bond was executed there was an intention to give up C.'s security, and that the contrary was expressly sworn; and that it was reasonable to require a further security, as C.'s executrix

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would be answerable only to the extent of the assets ; and that he was, therefore, of opinion that there was no ground for the interposition of a Court of Equity, and refused the motion with costs (1).

3. In *Webb v. Hewitt* (2) Vice-Chancellor Sir W. P. Wood said that as to giving time, the authorities, which were almost innumerable, had settled that upon any giving of time to a principal debtor, if there were a reservation of rights against the surety, the surety was not discharged ; for when the right was reserved, the principal debtor could not say it was inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him ; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety was informed of the arrangement was wholly immaterial ; but that a release, however, stands upon an entirely different footing ; that the case of *Nicholson v. Revill* (3), which is recognised in *Kearsley v. Cole* (4), has decided that when an actual release is given no right can be reserved, for the debt is gone at Law. And in this case (*Webb v. Hewitt*), the Vice-Chancellor held that an agreement between a bond debtor and his creditor that the latter shall take all the debtor's property, and shall pay his other creditors five shillings in the pound, though not a discharge of the bond at Law by way of accord and satisfaction, because not under seal, still operates in Equity as a satisfaction of the debt ; and it is not possible in Equity, upon such a transaction as that, to reserve any rights against the surety ; and any attempt to do so would be void as being inconsistent with the agreement. The defendant, the creditor, without having made any previous demand on the plaintiff, the surety, put the bond in suit against him ; and the plaintiff filed this bill to restrain the action, and to have the bond delivered up to be cancelled. The Vice-Chancellor said : " In the case before me there is clearly no discharge at Law, by accord and satisfaction, because the instrument by which the accord and satisfaction is alleged to have been made is not under seal. That point is determined in *Rogers v. Payne*, of which there

(1) *Gordon v. Calvert*, 2 Sim. 253 ;
4 Russ. 581.

(2) 4 K. & J. 438.

(3) 4 Ad. & E. 675.

(4) 16 M. & W. 128.

is a short note in 2nd Wilson, p. 276, and a full account in Mr. Selwyn's book, under the head of 'Covenant' (1). In this case, therefore, the agreement being simply in writing would not amount to a discharge at Law, and the only question is, what is its effect in Equity? There can be no doubt that the agreement was an equitable discharge, which would of course release the surety. But what I rest my judgment on principally is the result of this transaction upon the face of it. There is nothing in evidence that shakes any portion of the agreement. The utmost that the evidence amounts to is, that there was an intention with this agreement, such as it is, to assert a reservation of right against the surety. I hold that if such a reservation of right had been put in, it would have been a nullity. If a man, in consideration of the debt due from his principal debtor, agrees to buy the whole of the debtor's property, he has been paid; and if he has been paid, he cannot reserve his rights. That is the simple point to which the case is reduced. Therefore, the plaintiff is entitled to have his injunction made perpetual; and to have a declaration that the defendant has released the plaintiff from all liability under the bond, and a decree that the defendant should deliver up the bond to be cancelled, and the costs of the suit."

4. Where an injunction had been granted by Vice-Chancellor Sir J. Stuart to restrain an action on a bond against a surety, on the ground that when the bond was entered into a material fact was concealed from the surety, the Court of Appeal discharged the injunction, on the ground that the defence was equally open at Law by way of plea (2).

5. Equity will, in favour of a surety, enjoin a judgment suffered by him, on the promise of a creditor that it shall only be used to enforce a settlement with the principal, and will give him relief if the judgment is too large (3). So where, in consequence of representations made to him by the holder of a note, the surety upon it ceases to maintain a valid ground of defence, proceedings under a judgment so obtained will be enjoined (4).

Court of Appeal discharged an injunction to restrain an action against a surety, on the ground that the defence (here was available at Law.

(1) *Nisi Prius*, 6th Ed. p. 524.

(2) *Stiff v. Local Board of Eastbourne*, 17 W. R. 428; 20 L. T. (N.S.) 339.

(3) *Cage v. Cassidy*, 23 How. 109 (Amr.)

(4) *Dew v. Hamilton*, 23 Geo. 414 (Amr.)

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6. Where a sheriff in the United States, with full knowledge of the facts, neglects to levy an execution upon the property of the principal, and proceeds first upon the property of a co-defendant who is only a surety, it seems that the Court of Chancery, upon a bill filed for that purpose, will relieve the surety, if the surety cannot obtain satisfaction for the injury by an action upon the case against the sheriff (1).

7. Where a creditor fraudulently aids and assists the principal debtor to remove from the country, with the intent to hinder and delay the surety in his remedy against the principal, Equity will enjoin the creditor from enforcing his claim against the surety (2).

8. An action against a surety may be enjoined where Equity requires that the debt should be first satisfied from securities of the principal debtor, held by the creditor as a primary fund, more especially in the case of doubt as to their validity. Equity holds that this question should be first settled in an action, and at the expense of the creditor (3).

9. Equity will not enjoin a judgment against the surety upon a note, on the ground that the note was procured through misrepresentation as to its purpose by the principal, unless the payee were also guilty of such misrepresentation (4).

10. Where a judgment had been rendered against a principal and surety, and the surety executed his note with another surety, on condition that the plaintiff in the judgment would assign the judgment to the surety; but the plaintiff refused to assign the judgment, and entered satisfaction thereof; it was held, that the surety should have a perpetual injunction against the collection of his note, and the plaintiff should have the satisfaction set aside (5).

SECT. 3. *Stakeholder.*

A stakeholder
(here an
auctioneer)

1. A stakeholder who seeks to retain part of the stake is not an indifferent stakeholder, but has a personal question to maintain;

(1) *Boughton v. Bank, &c.*, 2 Barb. Ch. 458 (Amr.) (3) *Hays v. Ward*, 4 John. Ch. 134 (Amr.)

(2) *Smith v. Hays*, 1 Jones, Eq. 321 (Amr.) (4) *Griffith v. Reynolds*, 4 Gratt. 46 (Amr.)

(5) *Sommerhill v. Cartwright*, 7 Humph. 461 (Amr.)

and if he seeks an injunction to restrain any action against himself for the stake, he cannot obtain the injunction upon the principle of an interpleader bill, but under the old practice he must have obtained it upon an order for time, or upon the answer (1).

In this case the plaintiff was an auctioneer, and had sold an estate for one of the defendants; the other defendant was the purchaser, and had commenced an action against the plaintiff for the whole deposit; upon which the plaintiff—claiming to retain auction-duty and commission—filed a bill of interpleader against him and the vendor as to the residue of the deposit, and prayed for an injunction to restrain the action; and counsel for the plaintiff then moved for the injunction, and offered to pay the deposit-money into Court after deducting the duty and commission. But, upon the ground above stated, the motion was refused; an interpleader bill being where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants, which was not the case here.

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seeking to retain part of the stake, cannot obtain an injunction upon the principle of an interpleader bill.

SECT. 4. *Principal and Agent.*

1. Where a person had been appointed manager of a voluntary society, by the society, for the purpose of selling religious books on the society's premises, with a right to reside in a part of the premises, and to carry on the trade of a bookseller on his own account, and to have six months' notice to quit; and differences having arisen between him and the plaintiffs, the trustees and managing committee, from his having acted in a manner which the plaintiffs thought inconsistent with their rights and duties as the governing body of the society; and the plaintiffs having required him to quit possession, which he refused to do, and maintained himself in the premises by force; Vice-Chancellor Sir J. Stuart—on the ground that if the use and occupation of the premises given by the governing body with a view to the benefit of the society, was, in their opinion, turned to a purpose highly injurious

(1) *Mitchell v. Hayne*, 2 S. & S. 63.

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to the interests of the society, then, whatever case there might be for damages consequent on a sudden ejectment, it was their duty to see that the property which they held upon trust for a particular purpose was not used for a purpose hostile to the interests of the society—granted an interlocutory injunction restraining him from acting as agent or manager of the society, with liberty for him to reside in the premises for two months, and to remove his property (1).

Where agent confounds his principal's property with his own, he is chargeable with the whole.

2. Where an agent or bailiff confounds his principal's property with his own, or where a man who has undertaken to keep the property of another distinct mixes it with his own, the whole must, both at Law and in Equity, be taken to be the property of the principal or other party, until the agent puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture, and the agent is chargeable with the whole, except what he can prove to be his own; and in this instance (the case of a breach of the terms upon which the Court dissolved an injunction against continuing to work a lead mine) the inquiry was directed with costs; and the Court refused, in this case, a prospective direction to admit books not legal evidence, though usual in a fair case, as where, from want of notice of an adverse claim, a strict account cannot be given—merely giving liberty to apply upon any question of evidence (2).

A general allegation by an agent of mutual dealings, &c., between himself and principal, will not entitle to an account and an injunction against an action.

3. Upon an action at Law being brought to recover the produce of the sale of some foreign specie remitted by merchants abroad (the plaintiffs at Law) to agents in London (the defendants at Law), and the agents filing their bill, alleging generally that the plaintiffs had frequently been employed as agents to the defendants, and that there were mutual dealings and transactions between them, and praying that an account might be taken of them, and for an injunction to restrain the action, a demurrer was allowed (3). Alexander, L.C.B., said: "I think the facts charged in the present bill are too loose and vague to support it, not even stating that there are unsettled accounts, or that a balance is due to either party; and if these particular charges were struck out.

(1) *Spurgin v. White*, 9 W. R. 266; 7 Jur. (N. S.) 15.

(2) *Lupton v. White*, 15 Ves. 432. (3) *Frietos v. Dos Santos*, 1 Y. & J. 574.

it would not appear that any other transaction than the present had ever taken place between the parties. It is not every account which will entitle a Court of Equity to interfere; it must be such an account as cannot possibly be taken justly and fairly in a Court of Law;" and Vaughan, B., said it appeared to him that the parties, at the time of filing this bill, had nothing more in dispute between them than this particular transaction, as to which the remedy seemed to him to be clearly at Law.

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4. The duties of an agent are in the nature of personal service, and as such are incapable of being enforced in Equity; and Vice-Chancellor Sir W. P. Wood refused to restrain the defendants (a limited company) from appointing or retaining any person other than the plaintiff's firm as the agent of the defendants, the management and agency of which firm had been made a prominent condition in the prospectus on the foundation of the company, and expressly provided for by the articles of association; but, in refusing to grant the injunction, the Court put the directors, in any proceedings at Law to recover the amount due on A.'s shares, upon an undertaking not to set up the resignation of the plaintiff, which was alleged by him to have been wholly conditional on his being relieved from all liability in respect of shares (1).

The duties of an agent are in the nature of personal service, and incapable of being enforced in Equity.

5. Where the payee of a note deposits it in the hands of an agent to be collected, who causes a suit to be instituted thereon in the payee's name, for his own use, and, upon a judgment being obtained, refuses to yield the control thereof, but insists upon collecting and appropriating the proceeds to himself; Equity may enjoin the agent from all further interference, and the defendants in the judgment from paying, until the matters shall be there heard and adjudicated (2).

6. Where A., who had been the agent of B., his father-in-law, closed their dealings hurriedly, and obtained from B. his note in settlement of the account, which had been made on A.'s calculations and at his urgent request, upon the agreement that the whole settlement should be open to subsequent examination, and A. sued the note, and B. filed a bill to have the judgment thereon enjoined, and A. answered the specific allegations of the bill evasively—it was

(1) *Mair v. Himalaya Tea Company*, 14 W. R. 165; v. S. C. p. 213, *ante*.
L. R. 1 Eq. 411; 11 Jur. (N. S.) 1013; (2) *Dunn v. Dunn*, 8 Ala. 784 (Amr.)

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held, that an injunction should issue, to continue until the hearing, and the judgment stand as security for whatever might be ascertained to be due (1).

SECT. 5. *Landlord and Tenant.*

The Court will restrain tenant from pulling down a house and building another which landlord dislikes.

1. The Court will restrain a tenant from pulling down a house and building another which his landlord dislikes; and the Master of the Rolls, Sir J. Romilly, granted an interlocutory injunction to restrain a defendant (tenant) from so doing (2).

2. An injunction, though not to be continued with a view to specific performance of an agreement to grant a lease, if, under a clause for re-entry, the lease when granted would be at an end by the tenant's acts, was, upon a bill for specific performance of an agreement to grant a lease to the plaintiff, and an injunction to restrain proceedings at Law, maintained upon the plaintiff's undertaking to give possession when required by the Court and paying the rent due, intermediate acts having occurred which would have amounted to a waiver of the forfeiture of a lease executed of the same date as the agreement (3); and *quære* whether, even without a right of re-entry, the Court, seeing a gross case of waste and breach of covenant that could not well be indemnified by damages, would leave the tenant to Law and grant no relief here (4).

Tenant has no equity to compel landlord to expend insurance moneys against fire in rebuilding premises, nor to restrain suing for rent until premises are rebuilt.

3. A tenant (in this case a lessee for years) has no equity to compel his landlord to expend money received by him from an insurance office, on an insurance by himself against fire, on the demised premises being burned down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt (5). But a bill of interpleader may be brought by an insurance company against the landlord of premises which have been burnt down, but insured by him and the tenant of the premises under an agreement for a lease, the tenant claiming a

(1) *Hadley v. Rountree*, 6 Jones, Eq. 107 (Amr.)

(2) *Smyth v. Carter*, 18 Beav. 78.

(3) *Gourlay v. Duke of Somerset*, 1 V. & B. 68.

(4) *Ib.* 73.

(5) *Leeds v. Choetham*, 1 Sim. 146 (overruling *Brown v. Quiller*, Amb.

619; *et v. S. C. 2 Eden*, 219).

right to have the money laid out in rebuilding the premises (1). The first cause prayed the specific performance of an agreement for a lease against the defendant Gilham, and as against the other defendants, who were the directors of the Hope Insurance Company, that 700*l.*, the amount of a policy entered into by the defendant Gilham, might be laid out in rebuilding the premises, which had been consumed by fire, pursuant to the 14 Geo. 3, c. 78, s. 83. The second cause was a bill of interpleader by the insurance office against the landlord, who had brought an action on the policy, and against the tenant, who had filed the above bill. By an order in this cause, the money had been paid into Court, and the injunction granted. The Master of the Rolls, Sir W. Grant, said that, from the best opinion he could form, this was a proper interpleading bill. The landlord brings his action for the money, the tenant files a bill to have it laid out in rebuilding the premises. Though the mode of relief was different, the subject was the same, viz., getting at the money. The plaintiffs in the interpleading bill were ordered to be paid their costs of both suits, and of the action at Law, out of the fund in Court.

4. Where a lease has been granted upon lives renewable for ever, with a *nomine pœnæ* in case of the lessee's neglect to renew, Equity will not decree the lessor to renew, except upon the terms of paying the penalty (2).

5. Where a landlord, by his bailiff, distrained upon his tenant for an arrear of rent, and the tenant brought trespass against the landlord and his bailiff for an irregularity in the distress, and recovered damages, the bailiff being indemnified by the landlord in respect thereof; the Court held, on demurrer, that the landlord and his bailiff could sustain a bill to have the damages and the costs recovered by the tenant set off, *pro tanto*, against the arrear of rent due to the landlord, and to restrain execution in the meantime (3).

6. Where graziers, driving a flock of sheep to London, were encouraged by an innkeeper, the tenant of the premises, to put their sheep into pasture grounds belonging to the inn, and the Court relieved against a distress upon sheep put to

(1) *Paris v. Gilham*, *Jones v. Paris*, Coop. 56; *Jones v. Gilham*, 49.

(2) *Doneraile v. Chartres*, 1 Ridg. P. C. 1.

(3) *Hamp v. Jones*, 9 L. J. (N. S.) Ch. 258; *v. Beasley v. D'Arcy*, 2 Sch. & Lef. 403, n; p. 486, *ante*; *Maw v. Ulyatt*, 31 L. J. (Ch.) 83.

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graze with
landlord's
consent.

owner of the premises, seeing the sheep, consented that they should stay there one night, and then distrained them for rent in arrear by the innkeeper; the graziers were relieved—on the ground of the fraud of the owner of the premises to subject the sheep to his distress—against this distress; and the Court decreed the defendant, the owner of the premises, to answer to the plaintiffs the value of their sheep, with costs, both at Law and in this Court (1). And in *Brodon v. Pierce*, cited in the last case, where cattle had escaped into the next ground, and were distrained there for rent, Lord Nottingham relieved, in this Court, against the distress.

7. The Court of Equity in Ireland deals with its tenants as tenants at will, and therefore, when a tenant has been let into possession under the Court for a term of seven years, or pending the cause, the Court will not grant an injunction to dispossess him without an affidavit as to the state of crops (2).

If a stranger
builds on land
supposing it
his own, and
real owner,
perceiving the
mistake,
abstains from
setting him
right, Equity
will not allow
the real owner
afterwards to
assert his
title.

8. If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land on which the stranger had expended money on the supposition that it was his own. Equity considers that when the real owner saw the mistake into which the stranger had fallen, it was the duty of the owner to be active to state his adverse title, and that it would be dishonest on the part of the owner to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which he might have prevented (3). But if a stranger builds on land knowing it to be the property of another, there is no principle of Equity which would prevent the real owner from claiming the land, with the benefit of all the expenditure made upon it; there would be nothing in the owner's conduct, active or passive, making it inequitable in him (the owner) to assert his legal rights (4). So, if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined; he knew

(1) *Fowkes v. Joyce*, 2 Vern. 129.

(3) *Ramsden v. Thornton*, L. R. 1

(2) *O'Connell v. O'Callaghan*, 1 L.

H. L. 129.

& T. 157; 3 Ir. Eq. Rep. 199.

(4) *Ib.*

the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end (1). But if a tenant, being a mere tenant at will, builds on the land in the belief that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, knowing that he is acting in that belief, and does not interfere to correct the error, the Lord Chancellor Cranworth, following on this point the opinion of Vice-Chancellor Sir J. Stuart, said that he should have been much disposed to say that the tenant would be entitled to relief (2). But in this case it was held by the House of Lords (Lord Kingsdown *diss.*), reversing the decision of the Court below (Vice-Chancellor Sir J. Stuart) (3), that the circumstances of this case did not shew the existence of anything greater than a tenancy from year to year, and did not establish any title to compel the grant of a lease, and consequently that the landlord having brought ejectment against T., the respondent (a party who had taken, but for no time named, a piece of land belonging to the appellant from the appellant's agent by parol agreement and at a fixed rent, and who proved that buildings had been erected on the land, and that the persons who had so taken the lands were entered in the defendant's rental-book as tenants, and that leases had been granted, but produced no evidence of their being granted of right), Equity could neither interfere to compel the grant of a lease nor to stay the ejectment. But (*per* Lord Kingsdown) if a man, under a verbal agreement with a landlord for a certain interest in and, or under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such and with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation; but under the special circumstances of the case, the bill was ordered to be dismissed, without costs.

9. Where, in 1865, B., by a written agreement, let to M. a farm, B. "giving him a lease of three lives or thirty-one years,"

(1) *Ramsden v. Thornton*, L. R. 1 (3) *Thornton and Dyson v. Ramsden*,
L. L. 129. 4 Giff. 519.

(2) *Ib.*

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and the agreement did not contain any words of limitation, and no lease was ever executed, but the lessee entered and remained in possession till he died intestate, and his heir then entered; and the personal representative of the lessee brought ejectment; and the heir filed a bill for an injunction, and prayed that a lease should be executed to him, his heirs, executors, &c., for three lives to be named by him, and for a concurrent term of thirty-one years; the Court in Ireland held, that, under the circumstances, the personal representatives took, under the statute (1), the interest of the lessee (2).

Though no danger or irreparable injury, Equity will restrain lessee using premises contrary to a restriction in the lease.

And Equity will restrain both lessee and his sub-lessee, where lessee has notice landlord will not let for a particular purpose.

Equity will not enjoin use of premises for one purpose, merely because the lease contains a provision that they are to be used for another.

10. Where a lease restricted the use of the premises to "the regular dry-goods jobbing business," and the lessees commenced selling goods at auction therein, it was held, that although there was no danger or irreparable injury done to the lessor, nor any nuisance at Law, yet it was a breach of the covenant, and that the lessor could have an injunction (3). So, where A., a lessee, a drug-gist, with notice that the landlord will not let the premises for a bar-room, agrees to sub-let to B. for that purpose, and himself renews the lease, Equity will restrain both A. and B. from using the premises for a bar-room (4). So the administrator of an insolvent estate, having an undivided interest in a block of stores, may enjoin a lessee of one of them from a use injurious to the income of all (5). But it is held that Equity will not enjoin the use of leased premises for one purpose merely because the lease contains a provision that they are to be used for another, unless it is also provided that they shall be used for the latter exclusively (6).

(1) *Vide* 7 Wm. 3, c. 13, s. 9; 23 & 24 Vict. c. 154, s. 9; and the English statutes, 29 Car. 2, c. 3, s. 12 (the Statute of Frauds); 14 Geo. 2, c. 20, s. 9; 1 Vict. c. 26, ss. 3, 6.

(2) *M'Dermott v. Balfe*, 2 Ir. Eq. Rep. 440.

(3) *Steward v. Winters*, 4 Sandf. C. 587 (Amr.)

(4) *Parkham v. Aicardi*, 34 Ala. 393 (Amr.)

(5) *Ib.*

(6) *Brugman v. Noyes*, 6 Wis. 1 (Amr.)

SECT. 6. *Husband and Wife—Widow—Illegal Cohabitation.*PART I.
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1. Where by marriage articles it was agreed that the intended wife's property, real and personal, should be settled upon her for life, "for her own absolute use and benefit, free from all marital control and liability," without any restraint on anticipation; and by a subsequent deed (which was inoperative) the lady and her husband purported to settle the property with a restraint on anticipation; and she carried on the business of an hotelkeeper, and in so doing gave the plaintiff (a wine merchant) a bill of exchange accepted by her to secure a debt, and she was also possessed of some shares not included in the articles; and the plaintiff dealt with her after her marriage on the same terms as he had done before it, and credited her as a *feme sole*; and her husband became bankrupt, and the bill was dishonoured: the Lords Justices held, reversing a decision of the Master of the Rolls (who had decided that, so far as the articles were executory, the Court would restrain the lady from anticipation), that the restraint upon anticipation having been omitted, the Court would not construe the instrument as though the provision had been unintentionally left out, but would leave the parties to the remedy by bill for the rectification of the marriage settlement, and that the life interest of the lady was liable to make good the debt incurred by her in the trade for which she had accepted the bill (1).

2. Where a husband, seised in right of his wife, concurred with the other tenants in common in a partition of an estate and mines, but no fine was levied; and he died in 1828, after which his widow acquiesced in the arrangement, and took the benefit of it, and she and her lessee afterwards proceeded to get coal under the land awarded to other parties, and defended that proceeding on the ground that the husband's acts were invalid, and that the parties were still tenants in common of the whole; the Master of the Rolls, Lord Langdale, restrained her by injunction: in his judgment, his Lordship said, it appeared to him that the defendant, the wife, was, upon the death of her husband, acquainted with the

Acquiescence by widow in an award and allotment made during her husband's life, with his concurrence, binds the widow.

(1) *Symonds v. Wilkes*, 11 Jur. (N. S.) 659; 13 W. R. 1026; 12 W. R. 541; 12 L. T. (N. S.) 598; 10 L. T. (N. S.) 153.

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Personal
chattels be-
queathed to
single woman
for separate
use cannot be
taken in
execution by
judgment
creditor of
after-taken
husband.

The Court
will restrain
suit in Divorce
Court for re-
stitution of
conjugal
rights in viola-
tion of a cove-
nant.

But not if the
contract can
be set up as a
defence in the
Divorce Court,
or is executed
in ignorance
of wife's
adultery.

award and allotment, and that she considered the mines as well as the surface to be included, and that she acquiesced in it, not only by admitting that she was not entitled to encroach upon the allotments of others, but by exercising an exclusive right to let the coal under her own allotment for her separate benefit; and that she was not entitled, first, to avail herself of the award to exercise an exclusive right to get coal under her own allotment, and afterwards to reject the award, for the purpose of establishing a right to an undivided share of the coal under the whole district (1).

3. Personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, cannot be seized in execution by a judgment creditor of an after-taken husband (2).

4. Where by a separate deed a husband had covenanted with the trustees that he would not compel his wife to cohabit with him by any legal proceedings, and the trustees covenanted with the husband that she would not do the like; and the husband commenced a suit in the Divorce Court for restitution of conjugal rights, this covenant being no defence in the Divorce Court to such suit; Lord Chancellor Westbury held, reversing a decision of the Master of the Rolls, Sir J. Romilly (made on a motion on behalf of the wife and her trustees to restrain her husband from prosecuting the suit), that the Court would restrain such a proceeding by injunction (3). Where a husband had, in a separation deed, agreed not to commence or prosecute proceedings in the Divorce Court in respect of any cause of complaint which had arisen before the date of the deed, and had in the deed condoned and forgiven every offence then committed, and afterwards commenced a suit for obtaining a divorce, alleging that he executed the deed on the faith of his wife's assurance that she had not been guilty of adultery, which assurance he had subsequently discovered to be untrue: upon motion by the wife, in a suit for that purpose, for an injunction to restrain her husband from proceeding in the Divorce Court to obtain a dissolution of marriage, on the ground of a contract by the defendant to condone all former causes of complaint, and not to take legal proceedings in respect

(1) *Maden v. Veevers*, 5 Beav. 503.

(2) *Newlands v. Paynter*, 4 My. & Cr. 408.

(3) *Hunt v. Hunt*, 31 Beav. 89; 5 Jur. (N. S.) 85; 31 L. J. (Ch.) 161. 10 W. R. 215; 5 L. T. (N. S.) 778.

hereof; Vice-Chancellor Sir R. Malins held, that as the contract might be set up by way of defence in the Divorce Court, and as it was executed by the husband in ignorance of the fact that his wife had committed adultery, and on her positive assertion of innocence, this Court would not interfere to stay proceedings in the Divorce Court (1).

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5. When a Court of one country is called upon to enforce a contract entered into in another, it is not enough that the contract should be valid according to the law of the latter; for if any part of the contract be inconsistent with the law and policy of the former, the contract will not be enforced, even as to another part of it which may not be open to this objection, and may be the only part remaining to be performed. Therefore, where an Englishman married a Frenchwoman, and they resided in France, where their children were born, and suits were instituted between them in both countries, which were compromised by an agreement, of which part was that the wife would facilitate proceedings for a divorce, and another part was that one of the children should remain with his mother, and the third part related to the payment of an allowance to the wife; the Lords Justices held, that even supposing the parties to be domiciled in France, and the agreement to be governed by French law, and to be valid according to that law, and to have been performed as to the parts which were invalid according to English law, it could not be enforced here as to any part of it (2). In this case the bill, filed by the wife, alleged that the plaintiff had in all respects performed her part of the agreement, but that the defendant, the husband, had refused to perform his part of it; that he refused the plaintiff all access to the children, though she had frequently desired to visit them; and that he had paid no part whatever of the annuity, of the costs incurred by the plaintiff, or of the sum on account of her debts; and the bill prayed specific performance of the agreement, that the plaintiff might have access to her children at all reasonable times, that an account might be taken of the arrears of the allowance stipulated for by the agreement, and that the defendant might be

(1) *Brown v. Brown*, L. R. 7 Eq. 185; 38 L. J. (Ch.) 153; 19 L. T. 731; 22 Beav. 351.
(2) *Hope v. Hope*, 8 De G. M. & G. 594; 17 W. R. 98.

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ordered to pay such arrears, and to give security for future payment, and to pay the costs of the suit. The defendant demurred to this bill for want of equity, and the Master of the Rolls overruled the demurrer (1). An appeal by the defendant came on to be heard before the Lords Justices in July, 1856, and their Lordships having intimated an opinion that if the demurrer were allowed, leave must be given to amend, it was arranged that the demurrer should be allowed, without prejudice to any question, and with leave to the plaintiff to amend her bill, and that if the defendant should demur again, the demurrer should be brought directly before the Court of Appeal; the bill was accordingly amended, and the defendant again demurred. Lord Justice Knight Bruce, in his judgment on the demurrer, which was allowed, said that it was his opinion, and he believed that of the Lord Justice Turner, that by reason of the want of consideration, and not for that reason only, this contract, if treated as an English contract, was one on which this Court could not act; and that he, Lord Justice Knight Bruce, was certainly not of opinion that the stipulation in the document respecting the infant, and ward of the Court, and the article containing the word "facilitate" (i.e., as to the divorce), could be rendered sustainable in an English Court of justice by ascribing a French domicile, a French character, and, if he might so express himself, French intentions to the document. Lord Justice Turner, in his judgment, said: "In the course of the argument before us, my learned brother expressed our united opinion that if the law of this country only was to be taken into consideration in determining the case, the agreement could not be supported, and the demurrer must consequently be allowed, and we stopped the reply upon that point. The further consideration which I have since given to the subject has confirmed me in that opinion." And further on he said: "Upon carefully examining the allegations of this bill, on which alone the case, being before us upon demurrer, must be decided, I think it far from clear that the bill alleges such a case as would in strictness warrant us in taking the law of France into consideration. But I should not feel satisfied to dispose of the case finally upon that ground, and I think it better, therefore, to consider it upon the

(1) *Hope v. Hope*, 22 Beav. 351.

assumption that the law of France is to be taken into account, and that the agreement in question would, according to that law, be capable of being enforced. . . . The question is, whether, upon the assumption which I have stated as to the French law being taken into account, the bill can in other respects be maintained. I am of opinion that it cannot, and upon these grounds: I think that when the Courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the Courts of this country cannot, as I conceive, be called upon to enforce it. Now, there are two provisions of this agreement which, as it seems to me, are contrary to the law and policy of this country. By art. 1 of the agreement, one of the children is to remain under the care of the plaintiff, the mother. By art. 3 of the agreement, Mrs. Hope, the plaintiff, undertakes 'not to oppose the suit for a divorce, instituted against her by Mr. Hope in the English courts, but, on the contrary, to facilitate the obtaining such divorce.' Are these provisions consistent with our laws and policy? The first of them is in contravention of the order of the Lord Chancellor, stated in the bill (made in a suit on behalf of the infant children). It is not only in contravention of that order, but, as I apprehend, is in contravention also of the settled law and policy of the country. The law of this country gives to the father the custody of the children, and the control over them; and it gives him that custody and control not for his own gratification, but on account of his duties, and with reference to the public welfare. Then as to the 3rd article of the agreement. There is nothing which the Courts of this country have watched with more anxious jealousy—and, I will venture to say, with more reasonable jealousy—than contracts which have for their object the disturbance of the marital relations. The peace of families—the welfare of children—depends, to an extent almost immeasurable, upon the undisturbed continuance of those rela-

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tions; and so strong is the policy of our law upon this subject, that not only is marriage indissoluble, except by the Legislature (1), but divorces *a mensâ et thoro* are granted only in cases of cruelty or adultery. But what is this article of the agreement?—that the wife shall not oppose the husband's suit for a divorce, but, on the contrary, shall facilitate the obtaining it. I can conceive nothing more contrary to the policy of our law than this provision of the agreement. It is, as it seems to me, repugnant to the law, both as to the object which it has in view, and the means by which that object is to be effected. Lastly, it was urged on the plaintiff's behalf that, whatever objection there may have been to this agreement in its inception, what remains to be performed is legal and unobjectionable; but to hold that an agreement so objectionable as that this Court would not perform it, can be rendered capable of performance by the objectionable parts of it having been carried into execution, is a doctrine to which I cannot assent" (2).

6. Where M. had given a bond and warrant of attorney to secure the repayment of a sum of money, and judgment had been entered up, but not executed; and the bond and warrant of attorney came into the possession of L., as personal representative of the original obligee; and she was on terms of affectionate friendship with M., and often said that he had been unfairly treated in being made to enter into these securities; and L. had in early life received from the father of M. a conveyance of some property in India, and the deed of conveyance was expressed to be for a money consideration of 1000 rupees, but in truth the money consideration was, if any, a debt of 1200 rupees, and the rest was a purely voluntary gift, and no money whatever passed when the conveyance was executed; and M. was about to marry, and when his marriage was in contemplation discussions arose about the bond and warrant of attorney; and M.'s father told L. that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed which would put an end to the conveyance of this Indian property, as a voluntary conveyance made without consideration; and in his depositions he said that L. promised not to enforce the bond and warrant of attorney, if he would

(1) And now by the Divorce Court,
instituted under the 20 & 21 Vict. c. 85.

(2) *Hope v. Hope*, 8 De G. M. & G.
731.

abstain from interfering with the conveyance; and other evidence was given of directions by her, that she "had abandoned" the claim, and of a promise, often repeated, that she would never trouble M. about it:—the House of Lords held that this promise, if it constituted a contract, was not a contract made in consideration of marriage, so as to bring it within the words of the Statute of Frauds (1).

7. In *Wilson v. Wilson* (2), it is *queried* whether, as a rule of Equity, a Court of Equity can enforce by injunction a stipulation to live separate, or not to bring a suit for restitution of conjugal rights; though it is held there, that undoubtedly it can enforce stipulations as to an arrangement of property, and as to forbearance from personal molestation; and that the Court of Chancery has jurisdiction to enforce the specific performance of an agreement by which a person has bound himself to execute a deed, although such deed may be a deed of separation between himself and his wife. In this case, in the draft articles of an agreement, a mistake of a name had been made, and a bill was filed for the specific performance of those articles; and the Court of Chancery, on a consideration of what appeared in the bill and answer, and a consideration of the articles themselves, directed the specific performance of them according to what appeared to be their plain intention; and the House of Lords held that the decree of the Court of Chancery was correct (3). But as to the power of a Court of Equity to enforce by injunction the stipulations as to living separate, and not suing in the Ecclesiastical Court for living separate, in *Saunders v. Rodway* (4)—where, by a separation deed, a husband had covenanted with his wife's father, that his wife, during her life, might live separate from him, that he would not sue her in the Ecclesiastical Court for living separate, that he would not molest, &c. her, nor claim any of her property; and her father contracted with the husband to maintain her and indemnify him—upon a bill by the wife, and the personal representatives of the father, praying an injunction to restrain the defendant (the husband) from compelling the wife to cohabit with him, and from molesting, disturbing, or troubling her for living

(1) *Jorden v. Money*, 5 H. L. C. 185. (2) 5 H. L. C. 40; 23 L. J. (Ch.) 697.

(3) 1b.

(4) 16 Beav. 207; 16 Jur. 1005.

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separate and apart from him ; and also from molesting, disturbing, or troubling any other person or persons whomsoever, for receiving, harbouring, or entertaining her ; and from (without her consent) visiting her, or knowingly going into any house or place where she might dwell, or sending any letter or message to her ; and from endeavouring or making any attempt to get possession of her person, and from in any manner molesting or annoying her ; and upon a motion made for an injunction, in the terms of the prayer of the bill, the Master of the Rolls, Sir J. Romilly, said : “ I think this is a case in which the plaintiffs are entitled to an injunction in the terms of the deed. It is perfectly true (as Mr. Rogers observed) that this Court does not interfere with any question respecting the restitution of conjugal rights, and leaves such questions entirely to the Ecclesiastical Court, but this Court deals with covenants which parties enter into ; and if a person chooses to enter into a covenant restraining himself from proceeding in a matter in respect of which this Court may not have jurisdiction, yet having jurisdiction in matters of contract the Court will restrain him from violating his covenant. All that I have, therefore, to consider is, whether this is a valid deed, and executed by the husband, and if so, whether he has done acts in violation of it. If he disputes the validity of the deed, he may institute any suit he may think fit in this Court to set it aside ; but this Court has, undoubtedly, in a great number of cases, held that deeds of separation entered into between the husband and wife, with the interposition of trustees, who covenant to indemnify the husband against his wife’s debts, are such as it will enforce. The cases are numerous on the point.” But he added : “ It appears to me that the bill ought properly to seek the execution of the trusts of the deed, and the performance of the covenants, one of which, on the part of the husband, is not to do those acts which by the affidavit it appears he is now doing. The bill ought also to state that this is not a covenant which expired with the death of the father of the lady. By the deed it appears to be a covenant which binds his heirs and executors. Treating it, as I think I am entitled to do, as a bill for the execution of the trusts and the performance of the covenants of the deed, and being of opinion that the husband has violated them, I must restrain him from so doing, and there must

therefore be an injunction in the terms of the deed (1). And in *Worrall v. Jacob* (2), the Master of the Rolls, Sir W. Grant, said he apprehended it to be then settled that this Court will not carry into execution articles of separation between husband and wife; but that it had been held that engagements entered into between the husband and a third party shall be valid and binding, although they originated out of, and related to, an unauthorized state of separation, in which the husband and wife had endeavoured to place themselves. And in *Frampton v. Frampton* (3), it was held by the Master of the Rolls, Lord Langdale, that a deed of separation between husband and wife, containing no covenant on the part of a trustee to indemnify the husband, or other valuable consideration, is not on that account void as against the husband's estate. In this case the husband, by the deed, assigned the dividends of certain funds to trustees for the benefit of the wife, and he covenanted that she might live apart from him; and the wife agreed to accept the provision in lieu of alimony, dower, or any other claim on the husband, and to exonerate him from her debts, and not in any way to disturb him; the Master of the Rolls, in his judgment, observing that "it would scarcely be just to say, that although a voluntary trust may be binding in other cases, it shall not be so in the case where a husband has, by creating such a trust, prevailed upon his wife to live apart from him, and waive the enforcement of her conjugal rights." In *Legard v. Johnson* (4), it was held that the Spiritual Court (now the Divorce and Matrimonial Court, 20 & 21 Vict. c. 85) had exclusive cognizance of the rights and duties arising from the state of marriage, and that a Court of Equity therefore had no jurisdiction upon a contract for separation between husband and wife simply, much less where it will affect a purchaser or a creditor; but that the jurisdiction holds in special cases—as where a third party covenants to indemnify the husband against the wife's debts, or a fortune accrues to the wife after separation, or the property is the subject of a trust. The Lord Chancellor, in his judgment, said: "Those cases where the Court had acted at all stand under three heads. Where a third party had intervened, and it was not only between the husband and

(1) See also *Warrender v. Warrender*, 2 Cl. & F. 488.

(2) 3 Mer. 269.

(3) 4 Beav. 287.

(4) 3 Ves. 352.

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wife, a third party binding himself to indemnify the husband against the debts of his wife, the interest of that party raises a consideration for that party, between whom and the husband there might be a contract, and with regard to whom he might bind that party to himself: that was the case of *Seeling v. Crawley* (1). The other cases are, where a fortune accrued to the wife after separation, and an application was made to this Court upon a very plain ground, that some provision should be made for her out of a fortune coming under those circumstances. The principle is plain: if it happens from the situation of the parties that they cannot enjoy in common that which should maintain both, it would be very hard that the party from whom it moves should lose, and the other should gain the whole benefit (2). Another case in which the Court may take into its consideration the rights and duties arising from the relation of marriage, is where the property is only to be sued in this jurisdiction—where a trust is created, and there is no coming at it by the Common Law: that was the case in *Sidney v. Sidney* (3), and the other case quoted in the note upon that case—where, as a ground to give effect to articles made upon marriage, this Court considered the estate vested according to the articles, and the husband having used the estate as he ought not to have done, and as he could not have done in point of law if the articles had been completely executed prior to the marriage.”

8. Where the plaintiff had married the defendant, an alien, and afterwards, by a deed of separation not acknowledged, had conveyed real and personal estate to a trustee to pay an annuity to the defendant, and the trustee had covenanted to pay the annuity, and the plaintiff to indemnify the trustee; and upon an action being brought against the trustee by the defendant, the plaintiff filed a bill for an injunction, and to set aside the deed, under which she insisted that the defendant, as an alien, could take nothing, and that the marriage was not legal according to the law of Guernsey, where it was celebrated; and that she had executed the deed supposing the defendant to have legal rights over her property, and that the deed was not acknowledged: the Court

(1) 2 Vern. 386; *et v. Angier v.*
Angier, Prec. Ch. 496.

(2) *Vide Bull v. Montgomery*, 2 Ves
191.

(3) 3 P. Wms. 269.

refused to continue the injunction to the hearing on any of the grounds except the last (1). But, *semble*, the plaintiff having denied the marriage, and covenanted to indemnify the trustee, could not rely on the deed not being properly acknowledged (2).

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9. Where husband and wife, who were separated, entered into an agreement in writing, providing for their living together again, and stipulating that in the event of a future separation, for a particular cause, the wife should receive the income of her own fortune, which her husband was entitled to receive, and that her mother should indemnify him against her debts; and they afterwards separated, for the cause referred to by the agreement, and the wife obtained a divorce in the Ecclesiastical Court, and a sentence for permanent alimony to an amount exceeding the income of her fortune, and that alimony was regularly paid by the husband, and he received the income of her fortune, and the wife accepted a bill of exchange in favour of a creditor of her own; in a suit by that creditor, an injunction was granted to restrain the husband from paying to the wife the annual amount of the income of her fortune, as the validity of the agreement for future separation under which she was entitled to such income was not in dispute between the husband and wife (3). But the Lord Chancellor, Lord Cottenham, said that the question of the legality of such an agreement as providing for a future separation was difficult, and of too much importance to be disposed of on an interlocutory application (4).

10. The Court will not interfere either to compel or restrain the payment of alimony, as such, except so far as to grant a writ of *ne exeat* against the husband. The Lord Chancellor said no case had been referred to in which this Court had exercised its jurisdiction over alimony, except in granting writs of *ne exeat* (5).

The Court will not interfere on the subject of the payment of alimony as such, except to grant a *ne exeat* against husband.

11. Where the husband's executors were sued at Law for goods bought by the wife in her husband's lifetime, while she lived separate and had a separate maintenance, and this, as alleged in the plaintiff's bill, was known to the tradesman who sold the goods; upon a bill brought by the executors, after a verdict, to be relieved

No injunction against action against husband's executors for goods supplied to wife by tradesman knowing

(1) *Dunmoncel v. Dunmoncel*, 13 Ir. Eq. Rep. 92.

(3) *Vandergucht v. De Blaquiére*, 5 My. & Cr. 229; 8 Sim. 315.

(2) *Ib.*

(4) *Ib.*

(5) *Ib.*

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 CHAPTER IV. separate with allegations, if true, would have been a proper defence
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 tenance.

at Law (1).

12. Where A. before marriage, in consideration of the same and a portion with his intended wife, conveyed lands to trustees, in trust to pay £100 per annum to his intended wife for her separate use; and she, many years after her marriage, upon disputes between her and her husband, left him and went abroad; and the trustees brought ejectments to recover the terms in order to pay arrears of the annuity, and the husband brought his bill for an injunction to stay the proceedings in ejectment: Lord Chancellor Hardwicke was of opinion he could not relieve against the payment of the annuity, notwithstanding the husband by his bill offered to receive his wife again and pay her the annuity, if she would live with him; but directed an account, and on payment of the arrears of the annuity, the injunction to be continued, or otherwise dissolved; and if default in the growing payments, the wife to be at liberty to apply (2).

13. Where, in a separation deed, the husband covenanted with the trustee to allow to his wife £50 a year for her support, he being indemnified against all debts and liabilities on her account, and it being agreed on her behalf that she would not in any way endeavour to compel the husband again to live with her, or to allow her "any further, or greater, or other support, maintenance, or alimony" than the amount of £50; Vice-Chancellor Sir W. P. Wood held that, in the absence of any act shewing an undoubted and unqualified compromise of herself by some act of acceptance by the wife of the provisions of the separation deed, or of any attempt to enforce it against her husband, the Court would not, upon an interlocutory motion to restrain the prosecution of a suit for judicial separation and proceedings for alimony, restrain her from any proceeding in the Divorce Court, in the suit there, for the purpose of obtaining alimony *pendente lite*; but the Court put her under an undertaking to deal with any order the Divorce Court might make as to alimony as this Court should direct, and

(1) *Ferrars v. Ferrars*, 1 Vern. 71, 2nd Ed.; *sed vide Marshall v. Rutton*, 8 T. R. B. R. 545, as to the defence

being good at Law, cited in a note to the case in Vernon.

(2) *Moore v. Moore*, 1 Atk. 272.

upon that undertaking the motion to stand over until the hearing of the cause or further order. The Vice-Chancellor said there was no covenant in the separation deed that she would not sue for a judicial separation, so that the only question before him was, as to the application for alimony *pendente lite* (1).

14. Where a deed, made without any consideration, was executed by a husband, by which property was conveyed by him to trustees for the benefit of his wife, one of the provisions being an annuity for her in case she and her husband should cease to cohabit; and the deed also contained a covenant by the husband to pay costs which had been incurred by a solicitor (who prepared the deed and was one of the trustees) for the wife, and those costs included the costs of certain proceedings in the Ecclesiastical Court which had been instituted by the wife for the purpose of obtaining a separation from her husband; and it did not appear that any definite instructions for the preparation of this deed were ever given by the husband, or that its effect was ever properly explained to him by the solicitor; the Court—upon the ground that the defendant, the solicitor, being at the time of the execution of the deed in the position of solicitor to the plaintiff (the husband), it was his duty to advise the plaintiff that it was optional whether he would or not execute the deed and the agreement, and the deed purporting to be in pursuance of the agreement, and being, so far as it was an agreement between the husband and wife, altogether void at Law (Turner, L.J.); but that no such advice appeared to have been given by him; and upon the ground that the deed was a voluntary deed, and without any valuable consideration; and a deed by which a husband makes a provision for his wife in case of a future separation, is radically defective—held, that this deed must be set aside, and that a reconveyance of the property must be made by the trustees. The solicitor, however, having been in possession, as trustee under the deed, of some property of the wife, an account was directed of the rents received by him, and of the sums properly expended by him thereout; he, however, not being allowed any costs secured to him under or by virtue of the trusts of the deed (2).

(1) *Williams v. Baily*, L. R. 2 Eq. 138; affirming S. C., 35 Beav. 329; 14 W. R. 381.

(2) *Procter v. Robinson*, 15 W. R.

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Injunction refused to restrain husband preventing wife's solicitor, &c., having access to her, to enable her to execute an appointment, being no proof of instructions for such a deed.

15. In *Middleton v. Middleton* (1), Lord Chancellor Eldon refused an injunction to restrain a husband from preventing his wife's solicitor and friends from having access to her (she being confined by dangerous illness in his house), to enable her to execute a deed of appointment under a power in her marriage settlement, it not being proved that she had given instructions for such a deed; and the Lord Chancellor said he doubted whether he should interfere even if that were certain, and that there had been many cases where persons had been prevented from executing an instrument, and the Court had considered and treated it as if it had been executed (2); but, here, suppose the lady should die without executing the deed, would it be possible for the Court to consider it done, when it does not appear she gave instructions for it?

16. Where the plaintiff cohabited with M. S., a married woman, and in consideration of her agreeing to cohabit with him he executed a deed, whereby, for the consideration therein mentioned, he granted to a trustee for her an annuity, to commence on his death, marriage, or withdrawing his protection from her, and covenanted to charge any land that he should become possessed of with the annuity; and for further securing the annuity he executed a bond, in the penalty of £1000, to the trustee, and gave a warrant of attorney to enter up judgment against him on the bond; and judgment was entered up against him at the suit of the trustee for £1000 and costs; and some years afterwards the plaintiff married, previously to which he had put an end to his intercourse with M. S., and, having been advised that the annuity deed and collateral securities, which he stated to have been obtained from him for the consideration of future cohabitation, were not binding upon him, he refused to pay the annuity; in consequence of which M. S., in the trustees' name, brought an action against him on the judgment; and the bill prayed that the annuity deed and collateral securities might be declared void, and be delivered up to be cancelled, and that the trustee might enter up satisfaction on the judgment, and then the action might be stayed; a general demurrer by the trustee was allowed (3). The Vice-Chancellor, Sir L. Shadwell, in his judgment, said it seemed to him to be plain, upon

(1) 1 Jac. & W. 94.

Waltham's will), stated in 11 Ves. 638

(2) *Vide Luttrell v. Olmins* (Lord

(3) *Smyth v. Griffin*, 13 Sim. 245.

what was stated in the bill as to the contents of the annuity deed, the bond, and warrant of attorney, that upon the face of them they were given for an unlawful purpose, and would be held void at Law, and that the case therefore would fall within the principle adopted by Lord Chancellor Cottenham in *Simpson v. Lord Howden* (1).

In *Simpson v. Lord Howden*, Lord Cottenham held that there was no jurisdiction in Equity to order a legal instrument to be delivered up, on the ground of illegality which appears on the face of the instrument itself. In *Jones v. Lane* (2) Baron Alderson says: "The result of an examination of the authorities seems to be, that if a party has wrongfully obtained possession of a bill of exchange, although under circumstances which would give a complete defence at Law, Equity will nevertheless interfere, if, from lapse of time, or death of witnesses, such defence is likely to fail; but that if the objection, being apparent on the face of the instrument, must always be open to the defendant, whenever such action shall be brought against him, he is not entitled to apply to a Court of Equity for relief" (3).

There is no jurisdiction in Equity to order legal instrument to be delivered up on ground of illegality which appears on face of instrument, unless from lapse of time, &c., the defence is likely to fail.

17. In *Power v. Sheil* (4), an injunction to restrain a widow from proceeding at Law to enforce her dower out of lands of inheritance, purchased from her husband during marriage, was refused, the purchaser having, "through negligence, neither insisted on having a fine, nor used common diligence to ascertain and preserve evidence that a jointure had been settled on her; but the widow having, in her answer to the original bill, admitted that her husband, previous to marriage, had executed an instrument settling an annuity of £150 on her in case she survived him, together with a collateral bond, but of which she knew not the contents, she was restrained from proceeding to execute her writ of dower till after she had answered the amended bill." But it was held that she was not, as a condition connected with the order, entitled to a receiver, which would be an equitable execution; neither was she entitled to her costs at Law.

18. Where there is a bond debt to the wife, *dum sola*, and the husband recovers it at Law, Lord Chancellor Hardwicke said he

(1) 3 My. & Cr. 97.

(2) 3 Y. & C. 294.

(3) *Vide Cooper v. Joel*, 27 Beav. 313; *Williams v. Roberts*, 8 Hare, 315.

(4) Beat. 48.

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did not know that this Court had ever granted an injunction; for the husband's suing at Law was very proper, and therefore this Court left it to its natural course, without meddling with a legal question (1).

This Court will not suffer husband to take wife's portion until he has agreed to make a reasonable provision for wife.

19. This Court will not suffer the husband to take his wife's portion until he has agreed to make a reasonable provision for the wife; and where the Ecclesiastical Court has consented that a husband should receive his wife's portion, Equity has in many instances granted injunctions to stay the proceedings there (2).

20. In *Taylor v. Allen* (3), a wife who was an executrix was restrained from getting in the assets of the testator, her husband being in the West Indies, and not amenable to the process of the Court of Chancery.

Marriage should proceed from free choice, and Court relieved against a bond given to marry a certain man, or pay a sum by way of forfeiture.

21. Where there was a bond in common form for payment of money, but it was proved that the agreement was that the plaintiff (the obligee) should either marry such a man, or should, by way of forfeiture, pay him the sum of money mentioned in the condition; the Court—upon a bill to be relieved against the bond (the defendant having obtained judgment on the bond)—decreed it to be given up to be cancelled, and the defendant was also decreed to acknowledge satisfaction on the bond, it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion (4).

A contract by which a father deprives himself of parental control over his child is void; but such a contract is valid where father's conduct to child is so gross that Court would remove child from his custody.

22. A contract by which a father deprives himself of all his parental control over his child, is contrary to the policy of the law, and void; but such a contract is valid if the conduct of the father towards his child is so gross that the Court would remove the child from his custody. In this case, where a father, who had criminally assaulted his infant daughter, executed a separation deed, giving the sole control of his children to his wife, and the father afterwards attempted to obtain possession of his daughter; upon a bill by the mother, filed against her husband and the trustee of the deed to enforce the performance of the deed, and praying for an injunction to restrain the father from removing from, or prosecuting any proceedings to obtain their two children from her custody, or interfering with her in their management.

(1) *Jewson v. Moulson*, 2 Atk. 420.

(2) *Ib.*

(3) 2 Atk. 213.

(4) *Key v. Bradshaw*, 2 Vern. 102, 2nd Ed.

care, and protection, and also seeking to recover the arrears of an annuity covenanted to be paid by the deed—and for which deed the Master of the Rolls, Sir J. Romilly, said there was sufficient consideration, and that it was executed by the trustee (the trustee entering into the usual covenant to indemnify against the wife's debts)—the Master of the Rolls granted an injunction, and an account as prayed, and ordered the defendant (the husband) to pay the costs of the suit; and this decree was affirmed by the Lords Justices, except that the injunction was made until further order, instead of being perpetual (1).

23. A contract entered into and paid for by a wife, without the knowledge, but for the benefit, of her husband, is valid and binding when ratified by the husband (2). And where a wife, unknown to her husband, requested her father to sell a field to her, to be paid for out of her savings; and the father at first refused, but he received the money, and afterwards put the husband into possession; and for ten years the money was retained by the father without payment of interest, and the field by the husband without payment of rent; and the father then brought an action of ejectment to recover possession of the field, and the plaintiff's wife then told the plaintiff of the nature of the transaction; and he then instituted this suit against the father to restrain the action, and to compel the defendant to convey to him the field: the Master of the Rolls, Sir J. Romilly, held that the father was bound to convey it to the husband, and decreed accordingly (3).

A contract by wife without the knowledge of husband is valid when ratified by husband.

24. The plaintiff, previously to his marriage with A.'s daughter, wrote a letter to A. inquiring what fortune his daughter was entitled to; and A., in reply, wrote to the plaintiff a letter, dated the 29th of April, 1800, and stated therein that certain houses were entailed on his daughter after his decease; and A. died, leaving his daughter his only child, having devised all his real estates to his wife; and it was then discovered that A. was tenant in tail male of the houses, with reversion to himself in fee; and in January, 1816, the plaintiff and his wife filed a bill against A.'s widow (who was in possession of the houses), praying that the plaintiffs might be declared to have the

(1) *Swift v. Swift*, 34 Beav. 266; 458, 1148; *v. S. C.*, *post*, p. 677, 34 L. J. (Ch.) 394; 11 Jur. (N. S.) pl. 2.

(2) *Millard v. Harvey*, 34 Beav. 237.

(3) *Ib.*

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letter of the 29th of April, 1800, and the proposal therein contained, carried into execution, and to have the houses conveyed to the wife conformably to the representation therein contained, and that the same might be ordered and decreed accordingly; and that A's widow might be restrained from commencing or prosecuting any action of ejectment or trover, or other action at Law against the plaintiff touching any of the matters contained in the bill. A's widow had threatened to commence an action of ejectment against the husband, who had, upon A. the father's death, taken possession of the title deeds of the houses, and the husband (as alleged), having mislaid the above letter, delivered up the possession of the houses to the widow, but, having afterwards found that letter, he gave notice thereof to the widow and her solicitor, but she refused to let the husband into the receipt of the rents of the houses, or to account to him for them, and in consequence thereof the bill was thereupon filed. The Court granted an injunction, and the widow having put in her answer, the injunction was, in 1818, continued; and on the same day the plaintiff obtained an order to amend, but did not act upon it, or take any further proceedings, till May, 1820. In May, 1820, the bill was amended, and the widow having gone abroad without answering the amended bill, a decree was taken *pro confesso* against her in November, 1822 (1).

A purchase of goods, &c. by married woman from husband, through trustees, may be sustained against his creditors.

25. A purchase by a married woman from her husband, through the medium of trustees, for her separate use and appointment, may be sustained against his creditors; and an injunction will be granted to restrain the disposition of the goods purchased, taken in execution under judgments obtained against the husband by his creditors, if the purchase by the wife is *bonâ fide*: it is of no consequence whether it is before or after the marriage, though the husband is indebted at the time; and even though the object is to preserve from his creditors for the family the subject of the purchase—in this instance ancient family pictures, furniture, and other articles of a special and peculiar nature and value. The circumstances of the comparative value of the consideration, the continued possession (according to the title by the relation of the parties), the degree of notoriety, the want of an inventory, the satisfaction of some debts

(1) *Landon v. Morris*, 5 Sim. 247.

out of the property, &c., though circumstances of evidence, are not conclusive as to the nature of the transaction (1).

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26. In a marriage settlement, a covenant to settle the wife's after-acquired property will be construed as applying only to property acquired during the coverture, although the words "during the coverture" are not inserted. A joint and several covenant, in a settlement by an intended husband and wife, that if the wife, her executors or administrators, or the husband, his executors or administrators in her right, should "at any one time thereafter" become absolutely entitled to any real or personal estate, the husband and wife respectively, or their respective executors or administrators, would bring it into settlement, was held by Vice-Chancellor Sir R. Malins—upon a demurrer to a bill filed by the trustees of the settlement and the children against the wife (the husband having died), praying that it might be declared that the real and personal property acquired by the wife, under and by virtue of the husband's will, and her appointment thereunder to herself, were bound by the covenant in the settlement, and that she might be ordered to convey and assign the same to the trustees, and be restrained by injunction from otherwise disposing of it—not to apply to real and personal estate coming to the wife under the husband's will, and the demurrer was allowed (2).

27. Where the separate estate of a wife is levied on for the debt of her husband, an injunction may be obtained to stay the sale in default of any other remedy (3). With the assent of the husband, the labour of his wife and minor children may be applied to her separate estate, and his assent will be implied by circumstances; and an injunction was granted to restrain a creditor of the husband from selling, on execution, growing crops which were produced on the separate property of the wife by her labour and that of her children (4). And although Courts of Equity usually refuse to restrain a trespass by injunction, yet where property was bequeathed to the separate estate of a *feme covert* without any trustee, and was

The sale of the separate estate of the wife for her husband's debt will be restrained. The labour of wife and children may, with husband's assent, be applied to her separate estate. A bequest to the separate estate of a *feme covert*,

(1) *Arundell (Lady) v. Phipps*,
Arundell (Lady) v. Taunton, 10 Ves.
139.

(3) *Calhoun v. Cozens*, 3 Ala. 498
(Amr.)

(2) *Carter v. Carter*, L. R. 8 Eq. 551;
21 L. T. (N. S.) 194.

(4) *Johnson v. Vail*, 1 M'Cart. 423
(Amr.)

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will be protected where no trustee.

Where a division of husband's interest in wife's property cannot be made without aid of Court, it will enjoin sale of property until she is provided for. So, husband must provide for wife, if she

insist, before he can obtain a legacy, &c., to her, unless residing apart without consent, &c.

A conveyance by intended wife on eve of marriage is a fraud upon intended husband, if without his knowledge and assent.

about to be sold under an execution against the husband for his debt, the Court held that, the legal estate being in the husband, and therefore there being no one to sue for the trespass, it would interfere by injunction (1).

28. Where the claimants of a husband's interest in his wife's property cannot effect a division without the aid of a Court of Equity, a sale of the property will be enjoined till she is suitably provided for (2). So, Equity will, on an application by the wife, restrain her husband from proceeding at Law to obtain possession of a legacy or portion in personal estate, which comes to her by will or inheritance, without providing for her support, unless she is residing apart from him without his consent, and without sufficient cause (3).

29. A conveyance by a woman after a marriage engagement, and upon the eve of marriage, is a fraud upon the rights of the intended husband, and will not be upheld unless it appears clearly that he had knowledge of the transaction, and assented to it; and where a voluntary conveyance had been made, under such circumstances, of all the woman's property to a man of small means, he was enjoined from removing the property from the State, although it did not appear that he had any intention to do so (4).

SECT. 7. *Parent and Child—Infants.*

The Court will restrain a father from interfering with his son's education, where the father's conduct is improper.

1. The Court of Chancery will, under circumstances of improper conduct, restrain a father from interfering with the management and education of his son, in this case a ward of Court (5). And in *Ex parte Warner* (6) it was held, that a father can be restrained from exercising paternal authority over his children by the order of the Court. And where a man belonging to a sect called the "Lampeter Brethren" had married a lady, and, after cohabitation, abandoned her when she was far advanced in pregnancy; and he

(1) *Smith v. Bank, &c.*, 4 Jones, Eq. 303 (Amr.)

(2) *Corley v. Corley*, 22 Geo. 178 (Amr.)

(3) *Fry v. Fry*, 7 Paige, 461 (Amr.)

(4) *Johnson v. Peterson*, 6 Jones,

Eq. 12 (Amr.)

(5) *Creuze v. Hunter*, 2 Cox, 242.

(6) 4 Bro. C. C. 101.

then, with other brethren, and several other men and women, formed a society, under the name of "Agapemone," in which there was no observance of a Sabbath, no practice of public or private worship (except only that hymns or anthems of praise were sung), no usage of prayer as intercession of the Almighty, and in which it was held that prayer was useless, as the day of grace was past, and the day of judgment had arrived; and the husband, more than four years after the abandonment of his wife, endeavoured to obtain forcible possession of their child, a son between three and four years old; and the child had been made a ward of Court, and by his next friend presented a petition to restrain the father from interfering with him, or suing out a writ of *habeas corpus* to obtain possession of him: the Court held, that in England a man who holds that prayer, as entreaty and supplication to the Almighty, is no part of duty,—is superfluous, and that no day ought to be observed as the Sabbath, is to be deemed as entertaining opinions noxious to society, adverse to civilization, opposed to the usages of Christendom, contrary (as to prayer) to the express commands of the New Testament, and is disqualified for having the guardianship of an English child, although his own; and therefore made an order that the child should not be removed from the custody of his mother and maternal grandmother (1).

The Court restrained a father from obtaining the custody of his child, where his opinions on prayer and the Sabbath were opposed to the usages of Christendom, &c.

2. The rule of Law, that a covenant by a father to abstain from seeing or exercising any control over his children is void, is grounded on this, that such a covenant is opposed to the welfare of the child; but if the Court finds that, by reason of the conduct of the father, his control is injurious to the child, such a covenant will be enforced. And where, in a deed of separation between husband and wife, the husband, after having been guilty of such misconduct as proved him unfit to have the custody of his children, has covenanted that they should remain separate and apart from him, and under the control of his wife, the Court will not, on the ground of its being against public policy, refuse to enforce that covenant; and the Lords Justices—upon a bill by the wife, by her next friend, against her husband, praying for an injunction to restrain her husband from removing and from prosecuting any proceedings to obtain their two infant children from her custody, or interfering

The Court will enforce a covenant by the father to abstain from seeing, &c. his children, where his misconduct proves his unfitness to have their custody.

(1) *Thomas v. Roberts*, 19 L. J. (N. S.) Ch. 506.

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with her in the management, care, and protection of the children, and for an account and payment by her husband of the arrears of an annuity due to her for the maintenance of herself and the children under the terms of a separation deed—affirmed a decision of the Master of the Rolls, Sir J. Romilly, for the payment of the arrears of the annuity, and restraining the husband from removing or interfering with the children, but varied the decree by making the injunction until further order, instead of perpetual (1).

3. Where a husband, having separated from his wife under circumstances of grave suspicion as to her conduct, took from her the custody of their daughter, an infant of about eight years old; and he subsequently sued for a divorce, alleging adultery by her on two distinct occasions, but the suit failed, as the first alleged act of adultery had been condoned, and nothing more was proved on the second charge than levity and indiscretion; and the husband, however, continued to live separately from his wife, and went to India in performance of his military duties, having previously placed the child under the charge of his sister, residing in Switzerland, refusing to allow access by the mother to it, on the ground that this was best for the child; and his conduct had throughout been very indulgent to his wife, and free from blame; and the views of the mother as to the training of the child were antagonistic to those of the sister, who was also determined, as the mother alleged, that it should grow up a total stranger to her: upon a petition for access to the child, presented by the mother under 2 & 3 Vict. c. 54. Vice-Chancellor Sir W. P. Wood held, that the Court would not, under the circumstances, interfere with the father's arrangement for the training of the child. The Vice-Chancellor said, the father having wished his child to be under the guidance, care, and instruction under which it was placed, the Court had no right to have an opinion—provided the father's conduct was free from impropriety or bad motive, as it undoubtedly was—as to whether the father was judicious or not in the particular training he might direct the child to undergo; and dismissed the petition, but without costs (2).

4. Where the father of an infant of two and a half years, origin-

(1) *Swift v. Swift*, 34 Beav. 266; pl. 22.
11 Jur. (N. S.) 458, 1148; 34 L. J. (2) *Winscom, In re*, 11 Jur. (N. S.)
(Ch.) 209, 394; v. S. C., ante, p. 672, 297; 13 W. R. 452.

ally a Protestant, died a Roman Catholic, and his widow married again and was a Protestant, the Court refused to remove the child from the custody of the mother on the ground of her religious opinions. The Master of the Rolls, Sir J. Romilly, said, in these cases the Court only considers what is most for the benefit of the infant, and that no thing, and no person, and no combination of them, could, in his opinion, with regard to a child of tender years, supply the place of a mother. Upon appeal, Lord Chancellor Westbury declared that the infant ought to be brought up and educated, when capable of receiving religious education, as a member of the Roman Catholic Church; but that, having regard to her tender age and health, she should continue under the care of her mother, her husband, and Mr. W. (appointed guardians) until seven years of age, with liberty to apply then respecting the guardianship, education, and religious instruction of the child (1). And the general doctrine of this Court is, that the children should be brought up in the religion of their father (2). In this case the children were respectively twelve and fifteen years of age; and the Lords Justices, affirming a decision of Vice-Chancellor Sir J. Stuart, ordered the children to be brought up as members of the Church of England (of which their deceased father was a beneficed clergyman), and restrained their mother from taking them to a chapel of the Plymouth Brethren.

5. In *Pearce v. Crutchfield* (3), Lord Chancellor Eldon granted an injunction upon an affidavit of an intended marriage by a widow aged thirty-five, with a male infant aged eighteen, restraining all communication with him until further order, and that service of the order at the house which appeared to be the last place of abode of the widow, though apparently shut up—at the suggestion that some person was residing at the house—should be good service. And where an infant was about to contract an improper marriage, and his parent (in order to give jurisdiction to the Court) settled a small sum of money for his benefit; on a bill filed for execution of the trusts of the settlement, the Court granted an injunction to restrain the marriage (4).

(1) *Austin v. Austin*, 34 Beav. 257.

(3) 14 Ves. 206.

(2) *Newbury, In re*, L. R. 1 Eq. 431;(4) *Dawson v. Thompson*, 12 L. T.

L. R. 1 Ch. 263, 266.

(N. S.) 178.

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6. Upon the marriage, in Guernsey, of a female ward of the Court, all parties concerned in the transaction, including the husband, were ordered to attend; and the husband was committed to the Fleet, and restrained from receiving her visits there; and upon a subsequent day, it appearing that she was residing with a friend of her husband, she consented to go to another residence, under an intimation from the Court that if she did not consent, it would consider whether, by the jurisdiction of the Court over infants, it could not take possession of the person of the ward and compel her to do so. The husband, after some time, was permitted to propose a settlement, but the Lord Chancellor refused to discharge him on his undertaking to execute the settlement; and the marriage in Guernsey having been found by the Master void by the laws of Guernsey, a marriage by banns was ordered (1).

7. In *De Manneville v. De Manneville* (2), Lord Chancellor Eldon, under the circumstances of the case, restrained a father from taking his child out of the kingdom; and said that no affidavit was necessary to obtain an order that a child, a ward of Court, should not be taken out of the jurisdiction, and that if a child, a ward of Court, would not be safe, he would not even let it go to Scotland.

An infant is entitled to treat a person entering on his estate during his infancy as his bailiff.

8. An infant is entitled to treat a person who enters on his estate during his infancy as his bailiff, who is accountable as such; and the jurisdiction which this Court has to decree accounts of the estates of infants against persons entering thereon during their minority is not taken away by the fact that at the time when the bill was filed the infant had attained twenty-one; and upon a bill by the plaintiff, who had attained twenty-one, against the defendant, praying that he might be charged as guardian and bailiff, the Master of the Rolls, Lord Langdale, decreed (here) that the bill should be retained for a year, with liberty to the plaintiff to bring ejectment; and if the ejectment was brought, the defendant was not to set up any outstanding legal estate; Lord Langdale observing, that he thought it quite clear the whole object of the proceeding would be defeated if any outstanding term could be set up, and that he must consider this case as one of the few excep-

(1) *Bathurst v. Murray*, 8 Ves. 74.

(2) 10 Ves. 52, 56.

tions there were to the rule—that in order to obtain an injunction there must be a distinct prayer for it in the bill (1).

9. A man cannot be charged in Equity, after his majority, on a purchase, or sale, or contract, made during his minority, on the mere ground that, without any false assertion by the infant, the other party believed he was not a minor, and dealt with him on the supposition that only adults could enter into such transactions; and Vice-Chancellor Sir J. L. Knight Bruce therefore refused to entertain a bill for an injunction to restrain an action brought to recover certain railway shares which had been sold and assigned by deed to the plaintiff in Equity by the plaintiff at Law during the infancy of the plaintiff at Law, there being no evidence against the plaintiff at Law of misrepresentation as to his infancy (2).

10. Where the testamentary guardian of an infant sold part of his estates for the redemption of the land tax, and the vendee paid the purchase-money to the agent of the vendor, who was also agent for the vendee, and the conveyance was executed, but the agent did not pay the money into the bank, as required by the Act 38 Geo. 3, c. 60, and the purchaser entered and continued in possession for many years, paying the land tax, and nearly twenty years after attaining his age the heir-at-law brought an ejectment against the purchaser, to restrain which, and obtain a confirmation of the contract, the purchaser filed his bill, the Court dismissed the bill, but without costs (3).

11. A child *en ventre sa mère* might have been vouched in a recovery, though it was for the purpose of making him answer over in value, and such a child may be an executor, may take under the Statute of Distributions, may take by devise, may be entitled under a charge for raising portions, may have an injunction to stay waste, and he may have a guardian (4); and such a child, *i.e.* a child *en ventre sa mère*, is a person *in rerum naturâ*, and, both by the rules of the Common and Civil Law, is, to all intents and purposes, a child as much as if born in the father's lifetime (5);

A child *en ventre sa mère* may have an injunction to stay waste.

(1) *Blomfield v. Eyre*, 8 Beav. 250. affirmed, 2 Dow. & Cl. 414; S. C., 15 Bl.

(2) *Stikeman v. Dawson*, 1 De G. & (N. S.) 643.
Sm. 90.

(4) *Thellusson v. Woodford*, 4 Ves.

(3) *Hicks v. Morunt*, 3 Y. & J. 286; 322; 11 Ves. 112, 138.

(5) *Wallis v. Hodson*, 2 Atk. 117.

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and the mother may justify the detaining of writings on behalf of a child *en ventre sa mère*, and a limitation *hæredibus de corpore procreatis* will include issue afterborn, and so, *e converso*, *procreandis* includes issue already born (1).

SECT. 8. *Apprentice.*

1. Where the plaintiff's son had been apprenticed to the defendant for seven years, but the son quitted the defendant on being illused, and the defendant brought his action against the plaintiff on his bond for a part of the premium, and the plaintiff filed his bill for an injunction, and for a delivery up of the bond; Lord Chancellor Hardwicke held, that there was no ground for bringing the suit in this Court; and that the suit was a very unnecessary one, as the jurisdiction in such matters, under the 5 Eliz. c. 41, s. 35, was left entirely to the justices of the peace; and that misuser of an apprentice was not a foundation for coming into Equity; for if an action be brought by a master against the father of an apprentice for a breach of covenant in quitting his service, if misuser should appear, there is no breach. But, *with the consent of the defendant*, his Lordship decreed, that the injunction already granted should be made perpetual, and that the bond should be delivered up to the plaintiff to be cancelled; and at the same time he ordered the plaintiff to pay the defendant his costs at Law on the action upon the bond, and also his costs in this Court (2).

SECT. 9. *Authors—Publishers.*

The right of an author of an article in a periodical, to prevent a separate publication, is not copyright; a separate publication can be restrained without entering the article at Stationers' Hall.

1. The right of an author of an article in a periodical, under sect. 18 of the 5 & 6 Vict. c. 45, to prevent a separate publication, is not copyright within the meaning of sect. 24; and it is no objection to a motion for an injunction in such a case that the author has not entered his work at Stationers' Hall; and the republica-

(1) *Musgrave v. Parry*, 2 Vern. 710, 2nd Ed.

(2) *Argles v. Heaseman*, 1 Atk. 518; *v. Hale v. Webb*, 2 Bro. C. C. 78.

tion of the Christmas number of a periodical under a different title, form, and price (and not a mere reprint of the Christmas number, which would be legitimate), is a "separate publication" of an article contained in such number, which the author is entitled to restrain (1).

2. On a dissolution of partnership, where the defendant was one of the proprietors and partners, and also the editor, of a weekly periodical called 'Household Words,' the Master of the Rolls, Sir J. Romilly, held, that he was not justified in advertising that the publication would be discontinued; for that the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets; but the Court would not restrain him from advertising the discontinuance of the publication as regarded himself, nor from advertising a work of a similar description under a new name (2).

3. Where the plaintiff, an author, had agreed with the defendant, a publisher, that he (the defendant) should publish at his own expense and risk a certain work of the author, and, after deducting from the produce of the sale all expenses and certain allowances, the profits remaining of every edition that should be printed were to be divided equally between them, the books to be accounted for at trade price, unless it should be thought advisable to dispose of any at a lower price, which was to be left to the discretion of the defendant; Vice-Chancellor Sir W. P. Wood held, that this was a joint adventure, and, if a license at all, it would be only a license necessary for carrying on the joint adventure, and nothing more than an implied license for that purpose, and not a parting with, or agreement for the sale of, the copyright by the plaintiff to the defendant (3); but that the defendant could at any time put an end to the agreement by refusing to publish any more editions; that the form, type, price, time, number, &c., of every edition was left to the sole judgment and discretion of the defendant. And the Vice-Chancellor also held, that "edition" meant every quantity of books put forth to the bookselling trade and to the world at one

(1) *Mayhew v. Maxwell*, 1 J. & H. 312; 9 W. R. 118.

(3) *Reade v. Bentley*, 3 K. & J. 271; 4 K. & J. 656; 4 Jur. (N. S.) 82;

(2) *Bradbury v. Dickens*, 27 Beav. 53; 28 L. J. (Ch.) 667.

27 L. J. (Ch.) 254.

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time by the defendant; and that when the advertisements, the printing, and other well-known expenses and acts by a publisher bringing out such quantity of copies in the ordinary way are closed, that constitutes the completion of the edition, whether the copies are taken from fixed or moveable plates or types, and whether the types or plates are broken up or not, and whether all the copies taken are given forth and advertised for sale, or retained and stored in the warehouse of the publisher; that it was to be inferred from the agreement that the publisher was to fix the selling price of the book, and that he was at liberty to publish more than one edition; but that the plaintiff had a right, at any time after the publication of the first or any subsequent edition, and before any expense had been incurred towards another edition, to put an end to the above agreement between himself and the defendant, by notice given to the defendant before any expense had been incurred towards another edition (1).

4. Where S., proprietor of a weekly newspaper, by a letter to F., an author, had agreed that F. should write two tales, extending over one year, at £10 per week for each number, to contain about the same quantity as was sent under a former similar engagement, and to receive the first number on the 22nd of April, 1855, and to continue to receive one number weekly during one year, conditionally that F. should not write for any other newspaper published at less than 6*d.*; and F. had accepted the engagement, and had received £20 deposit, and had written regularly for some weeks, and then went to Paris, and sent an abrupt conclusion of a current tale in a small quantity of manuscript, and refused to proceed with his engagement with S., and entered into another engagement with C.; and S. thereupon stopped his payments to F., and employed another author to conclude the half-finished tale; Vice-Chancellor Sir W. P. Wood held, that the engagement was a yearly engagement, and could not be terminated by F. as a weekly engagement; that the condition as to F. not engaging elsewhere was valid; and that, under the circumstances, S. had behaved reasonably, and not so as to deprive himself of his remedy by injunction (2).

(1) *Reade v. Bentley*, 3 K. & J. 271; (2) *Stiff v. Cassell*, 2 Jur. (N. S.) 4 K. & J. 656; 4 Jur. (N. S.) 82; 348.
27 L. J. (Ch.) 254.

5. Where the plaintiff had become, by purchase, in February, 1856, proprietor of a weekly newspaper called the *Britannia*, which he subsequently had incorporated with another weekly newspaper called the *John Bull*, and had issued the publication under the title of the *John Bull and Britannia*, but he had not registered his name at the Stamp Office as the proprietor of either newspaper; and on the 12th of April a notice was inserted in the *Britannia*, to the effect that that paper would be united with the *John Bull*; and on the 19th of April the defendant, who had been the printer and publisher of the *Britannia*, issued a publication called the *True Britannia*, in imitation, and as a continuation of the *Britannia*; and a bill was filed against the defendant, as the proprietor of the new newspaper, to restrain him from publishing it; and the defendant, in his affidavit, said that A. B. was the registered proprietor of the *True Britannia*, and that he was the printer and publisher only: on motion for an injunction, Vice-Chancellor Sir J. Stuart ordered the defendant to be restrained from printing and publishing, &c. the *True Britannia*, or any other newspaper as a continuation of the *Britannia* (1).

6. The right and property of an author or composer of any work, whether of literature, art, or science, in such work, unpublished, and kept for his private use or pleasure, entitles the author or composer to withhold the same altogether, or so far as he may please, from the knowledge of others; and the Court will interfere to prevent the invasion of this right by the publication of a catalogue containing a description of such work; and the Court will also interfere, by injunction, to prevent a party availing himself of a possession of etchings or impressions of a work, where the possession originates in a breach of trust, confidence, or contract; and the cases in which the Court refuses to interfere by injunction until the legal right is established at Law, have no application to cases in which the Court exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right, or breach of contract or confidence. And where a workman, intrusted with copperplates for the purpose of taking impressions for the plaintiff of etchings made by the latter, and not intended for publication, took impressions for himself in violation of the trust, and

The right and property of an author or composer, in his work unpublished, entitles the author, &c., to withhold it from the knowledge of others. The Court will restrain the publication of a catalogue containing a description of such work.

(1) *Prowett v. Mortimer*, 2 Jur. (N. S.) 414.

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sold the impressions to the defendant, who published a catalogue of them, accompanied by remarks of his own; Vice-Chancellor Sir J. L. Knight Bruce, at the hearing of the cause, granted a perpetual injunction to restrain the making any engraving or copy of the etchings, and publishing the same, or parting with them, or selling or publishing the catalogue, or any work purporting to be a catalogue of the etchings; and ordered the impressions of the etchings to be delivered to the plaintiff, and the copies of the catalogue to be destroyed; and held that the defendant was not entitled to a preliminary trial of his title at Law(1). And in this case, where, upon a previous interlocutory application for an injunction, the evidence had only made out a case of suspicion that a breach of confidence had been committed, but on the defendant putting in his answer, denying notice of any such breach of confidence, not, however, fully or satisfactorily accounting for his possession of the etchings, and moving to dissolve the injunction; the Vice-Chancellor held, that there was sufficient ground for suspicion, that there were equitable as well as legal grounds for interference, to make it right to continue the injunction to the hearing (on proper undertakings), without putting the plaintiff to establish a title at Law (2); and, *semble*, that independently of the breach of trust, the legal right of the plaintiff to preserve the privacy of his unpublished works was so clearly infringed by the publication of the catalogue, as to entitle him to have it protected by injunction, without obtaining the decision of a Court of Law in its favour; and that the distribution of a few copies of the etchings to private friends did not prejudice this right (3).

7. Where the Court, on the 20th of December, had awarded an injunction to restrain the defendant from assigning, vending, or disposing of the patents and leasehold premises of the partnership mentioned in the bill, and from removing the books from the partnership premises, but made no further order; and in the early part of February following the plaintiff had caused an advertisement to be issued, to the effect that patents could not be parted with or disposed of, or any licenses thereunder granted, without the consent of the plaintiff, and that the defendant had not any legal right to buy

(1) *Prince Albert v. Strange*, 2 De G. & Sm. 652; 1 Mac. & G. 25; 1 H. & T. 1.

(2) *Ib.*

(3) *Ib.*

materials for wire-ropes, or receive money for sales of wire-ropes, except with the consent of the plaintiff; and that all persons so dealing with the defendant without the plaintiff's consent, after this notification, must take upon them all the consequences, losses, damages, and legal proceedings which might be incurred by their so doing; the Vice-Chancellor, Sir J. Wigram, said, that the insertion of the advertisement in this form was not a contempt requiring the interference of the Court by committal; but that the plaintiff had, whether ignorantly or not, published an advertisement containing a statement composed partly of what the Court had ordered, and partly of what it had not ordered; and that if an advertisement of this kind had been published before the motion for the injunction, he most probably would not have granted it; that on obtaining that assistance from the Court the plaintiff had undertaken to do what should be right on his part; and that, therefore, in upholding the injunction, the Court would require the plaintiff to insert such other advertisements as would correct the error contained in those which had given rise to this application (1).

8. An agreement by a publisher not to publish in future a magazine of a particular description, is like the case of an agreement by the proprietor of a particular article of trade, after disposing of it to another, not to deal with that article again, and is not void as a too general restraint on trade; but on an interlocutory application for an injunction to restrain the breach of such an agreement by the publication of a certain named magazine, or any other magazine coming within the description contained in the agreement, the publication of the named magazine only will be restrained. However, on this, an interlocutory application for an injunction to restrain the publication of the magazine, Vice-Chancellor Sir W. P. Wood said, there would be great hardship in stopping the ensuing number, and that that would not be done; but granted an injunction restraining the defendant from carrying on the said magazine, without prejudice to the publication of the magazine until the hearing of the cause, the name of the defendant not to appear in the title-page or advertisements of the magazine, without prejudice to the right (if any) of the plaintiff to damages or profits in respect of the publication of the work (2).

An agreement by a publisher not to publish a magazine of a particular description is like an agreement of the proprietor of a particular article of trade not to deal with that article again.

(1) *Matthews v. Smith*, 3 Hare, 331. (2) *Ainsworth v. Bentley*, 14 W. R. 630.

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SECT. 10. *Actors.*

1. Where a manager of a London theatre had engaged a provincial actor, desirous of appearing on the London stage, for two years, though there was nothing expressed on the subject, the Court inferred an engagement on the part of the manager to employ the actor for a reasonable time, and on his part not to perform elsewhere. But the manager having (under these circumstances) delayed the actor's appearance for five months, who then broke his engagement, and went to another theatre; the Master of the Rolls, Lord Romilly, upon a bill filed by the manager to restrain the defendant from performing at the other theatre, held, that he had a right so to do, and that the manager was not entitled to an interlocutory injunction to prevent his performing there (1).

SECT. 11. *Receivers—Sequestrators—Officers of the Court.*

The Court will restore sequestrators forcibly dispossessed. The Court has a discretion as to allowing proceedings in other Courts for misconduct of officers—but the Court will not allow the questions of the authority of the officer or validity of its orders to be decided in any other Court.

1. In *Pelham (Lord) v. Newcastle (Duchess)* (2), the Court restored by an injunction sequestrators who had been forcibly dispossessed.

2. If the misconduct of an officer of the Court, in executing its orders, become the subject of civil proceedings before another tribunal, the Court, in its discretion, may either itself take cognisance of the complaint, or may leave the matter to be dealt with upon such proceedings; but wherever the title to redress against such officer is founded on a denial of his authority, or on an alleged defect in the order which he has executed, the Court (which alone is competent to decide upon the validity of its own orders) is bound to interpose by injunction, and assume exclusive jurisdiction over the matter of complaint (3). This was a motion before Lord Chancellor Brougham to discharge an order of Vice-Chancellor Sir L. Shadwell, refusing to dissolve an injunction granted to restrain proceedings in an action of trespass against a receiver and the bailiff who had levied a distress for rent in arrear by the tenant; the motion was refused with costs. So the Court will stay proceedings in an action against its officers, where the

(1) *Fechter v. Montgomery*, 33 Beav. 22.

(2) 3 Sw. 289.

(3) *Aston v. Heron*, 2 My. & K. 390.

question to be tried is, how far they have conducted themselves with propriety in the execution of its orders (1). And in *Hyde v. Holmes* (2) a party improperly arrested under an attachment was enjoined from proceeding at Law, without prejudice to his applying to this Court for compensation (3); and compensation can be got in this Court only for any misuse of its own process (4); and the Court will not allow a person to bring an action at Law for damage for an improper arrest under an attachment, but will refer it to the Master to inquire what compensation he ought to receive (5).

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A party improperly arrested will be restrained proceeding at Law, and must apply to this Court.

3. Where in a suit in Equity by mortgagees of a dock against the trustees and a judgment creditor, the chairman had been appointed receiver of the tolls, with direction to pay into Court the balance, after paying the expenses of carrying on the concern and the interest on the mortgages; another judgment creditor, who was not a party to the suit, having afterwards proceeded to attach the tolls under the Common Law Procedure Act, 1854, was, on motion, restrained by injunction from interfering with the functions of the receiver, or intercepting the payment of rates or tolls during the receivership. The Court will not permit its receiver to be interfered with or dispossessed of the property, nor will it allow payment to him to be intercepted, although the order appointing him may be perfectly erroneous. An application must first be made to the Court for leave (6).

This Court will not allow any interference with the functions of a receiver, and that, although the order appointing him be perfectly erroneous.

4. Where the inspectors appointed by a deed of inspectorship registered under the Bankruptcy Act, 1861, filed a bill against the debtor, charging him with obstructing them in their duties as inspectors, and with collecting assets and applying them to his own purposes, contrary to the covenants of the deed, and alleging that they were unable to prevent his proceedings, and that irreparable mischief would result, and praying a receiver; upon a motion by the plaintiff for an injunction and the appointment of a receiver, Lords Justices Wood and Selwyn held, upon the before-mentioned charges and allegations, and affirming the decision of Vice-Chancellor Giffard appointing a receiver, that this Court had jurisdiction

Inspectors of deed registered under the Bankruptcy Act, 1861, may obtain a receiver in Chancery upon charges of obstruction and irreparable mischief.

(1) *Ex parte Clarke*, 1 Russ. & My. 563.

(4) *Nugent v. Nugent*, 2 Moll. 372.

(5) *Batchelor v. Blake*, 1 Hog. 198.

(2) 2 Moll. 273.

(6) *Ames v. Birkenhead Docks (Trustees of)*, 20 Beav. 332.

(3) *Ib.*

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to appoint a receiver, and that, although the property might have to be distributed in Bankruptcy, and though the Court of Bankruptcy might be able to give the same relief (1).

The Court will restrain receiver prosecuting unjust suit at law, although complainant is not a party to the

5. The Court by which a receiver is appointed will restrain him from prosecuting an unjust and vexatious suit at Law, although the complainant is not a party to the suit in which the receiver was appointed (2).

suit in which receiver appointed.

SECT. 12. *Lunatics.*

1. In *Ex parte Vaughan, Re Edridge* (3), upon a petition of a tenant of a lunatic's estate praying that the committee might be restrained from proceedings in actions of ejectment brought against the petitioner and his under-tenants for the recovery of the demised premises, in pursuance of orders made in Lunacy, the tenant of the estate was relieved against the ejectment, which was founded on a forfeiture by breach of covenant to repair. The Lord Chancellor, Earl Eldon, said that where a man filed a bill for an injunction to be relieved against the effect of his own conduct, the Court would not in general cases relieve him; but that it would be an administration in Lunacy extremely prejudicial to the estates of lunatics if too hard measures were adopted with the tenants, and upon the tenants paying the costs of the repairs and of all the proceedings, the actions were stayed.

2. In *Re O'reagh* (4) a tenant on a lunatic's estate was restrained on petition from committing waste, no bill being filed; and in *Re Chinnerys* (5) an injunction to restrain waste was issued in a lunacy matter, on an application of the receiver, without a bill being filed.

(1) *Riches v. Owen*, L. R. 3 Ch. 820; 16 W. R. 963, 1072.

(2) *Matter of Merritt*, 5 Paige, 125 (Amr.)

(3) T. & R. 434.

(4) 1 Ball. & B. 108.

(5) 6 Ir. Eq. Rep. 469; 1 J. & L. 90.

SECT. 13. *Barrister—Counsel.*PART I.
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1. A barrister who has for a series of years been legal adviser to a party, and in one case in particular, of a controverted claim, which the client sought to compromise, will not be allowed to buy up such outstanding claim, though the relation of counsel and client has ceased, and if a counsel makes such a purchase it will be held a trust for his former client (1). A barrister, adviser to a party, will not be allowed to buy up an outstanding controverted claim, though the relation has ceased.

2. This Court would restrain by injunction a counsel from divulging secrets of a former client (2); but this decree was reversed by the House of Lords on appeal, on the ground that relief could only be obtained by a cross bill (3). The Court will restrain counsel divulging secrets.

3. The Court will not interfere in questions arising upon the practice of retainer where the usual means of securing counsel have not been taken. And in *Baylis v. Grout* (4), on a motion for the part of the defendants in the cause for an injunction to restrain a particular counsel from acting as counsel for the plaintiffs, from whom he had received a retainer since his promotion to the rank of king's counsel, on the ground that he had drawn an answer to the bill, and had otherwise acted in the progress of the suit on behalf of the defendants; the Master of the Rolls, Mr C. Pepys, said that as the defendants had not taken the usual means of securing the professional assistance of the counsel the Court could not interfere. The Court will not interfere on questions of retainer where usual means of securing counsel not taken.

4. This Court will not suffer counsel to maintain an action for fees, which is *quiddam honorarium*; nor (at the period of this case), when he happened to be a mortgagee, to insist on more than legal interest, under pretence of gratuity or fees for business formerly done in the way of a counsel (5). This Court will not suffer counsel to maintain action for fees.

5. So far as the rights of the plaintiff are affected by the breach of an injunction, it is no defence to the party violating the injunction that he acted with the advice of counsel, though, if he has acted in good faith, he may be protected from punishment as for criminal contempt (6).

(1) *Carter v. Palmer*, 1 Ir. Eq. Rep. 39; 1 D. & Wal. 722. parte, Re Joiner, Mont. 69; *Ex parte Lloyd*, Ib. 70, note (a).

(2) *Carter v. Palmer*, 1 Ir. Eq. R. 302. (5) *Thornhill v. Evans*, 2 Atk. 332;

(3) *Id.* 11 Bli. (N. S.) 399; *v. Ross* 9 Mod. 331.

Steel, 1 Ir. Eq. 171. (6) *Hawley v. Bennett*, 4 Paige, 163

(4) 2 My. & K. 316; *et v. Elae*, *Ex* (Amr.)

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SECT. 14. *Solicitor—Attorney.*

1. Where the defendant, a solicitor, having accepted the situation of clerk to the plaintiff, a solicitor practising at N., entered into a bond with him, which, after reciting that the defendant had been appointed agent to O., was conditioned to be void if he (the defendant) should abstain from practising as a solicitor at N. or within thirty miles thereof without the consent of the plaintiff, and should not act as O.'s legal adviser, except as the plaintiff's clerk, and should not accept or undertake any other agency or appointment (except such as he then held) without the plaintiff's consent, and in case the engagement with him should be put an end to or determined, should not continue to act as agent to O.; and the plaintiff afterwards gave the defendant three months' notice to leave his office, and thus put an end to his engagement; and at the expiration of that time the defendant resigned his appointment as agent to O., but subsequently resumed it, and obtained the office of clerk to the magistrates, and other offices; Vice-Chancellor Sir J. Stuart granted an injunction to restrain the defendant from acting as agent to O., as clerk to the magistrates, and from otherwise violating the stipulations of the bond (1).

A solicitor will be restrained communicating to a party suing a former client, matters, &c., of evidence, which came to his knowledge as solicitor to his former client.

2. In *Lewis v. Smith* (2), upon a bill by a member of the provisional committee of an abortive railway company, praying for the injunction decreed, and also for specific performance of a contract of indemnity—as to which latter object the bill was dismissed—an injunction was decreed to restrain a solicitor from communicating to a party who was suing a former client documents or matters of evidence which had come to the possession or knowledge of the solicitor in respect of his employment for such client, and to restrain the party suing from using in his action, or otherwise, any documents or matters of evidence which he had so obtained. The Lord Chancellor, Lord Cottenham, observing that the plaintiff was entitled to all the protection against the acts of his solicitors that any other client was entitled to.

3. Where a bill was filed by the residuary legatees under a will against the executors, of whom one was also beneficially interested as a legatee, and had undertaken the sole management of its affairs

(1) *Edmonds v. Plews*, 6 Jur. (N.S.) 1091.

(2) 1 Mac. & G. 417.

and the bill charged particular acts of mismanagement, and the appropriation by the managing executor to his own purposes of part of the trust funds; and the solicitor for the plaintiffs, having been for several years the friend and solicitor of the managing executor, had become well acquainted with the circumstances of the trust, and had been engaged in recovering money from a debtor to the estate, and had been consulted by the managing executor when one of the residuary legatees, the present plaintiff, had applied for the executorship accounts, which had been delivered under the solicitor's advice, and the solicitor's bill for the matters was made out against the managing executor, not as executor but personally; and the bill was taxed, and an action brought for the amount, which was paid, and the character of solicitor and client thus ceased in 1847; a motion by the managing executor, the former client, for an injunction to restrain the solicitor from acting as the solicitor for the plaintiffs in the cause against him was dismissed. The Vice-Chancellor, Sir J. L. Knight Bruce, said, the state of circumstances considered, he was of opinion that there was no title to an injunction here; that if special circumstances were required, they were not here; and, distinguishing *Davies v. Clough* (1), said, that here the Court said that the solicitor had virtually discharged himself, but that in this case the client had discharged the solicitor (2). But in *Biggs v. Head* (3) the solicitor of a deceased client, and who also acted as such for his executrix and devisee, was restrained, at their instance, from acting as solicitor for a creditor in whose name he had filed a bill to raise the amount of a judgment debt out of the estate of the deceased, although such creditor had been the client of the solicitor before he became concerned for the deceased, and although the solicitor contended that he had been discharged, and insisted that it was not in his power to communicate anything injurious to the estate, all the material facts and documents having, as the solicitor alleged, been put in issue by a bill previously filed by another creditor of the deceased. In *Davies v. Clough* (4), where A., a solicitor, had been employed by B. to negotiate and conclude an agreement on her behalf, and

(1) 8 Sim. 262.

(3) Sau. & Sc. 335.

(2) *Parratt v. Parratt*, 2 De G. & J. 258.

(4) 8 Sim. 262; affirmed on appeal, Ib. 269.

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disputes then arose between them as to A.'s bill of costs, which B. procured to be taxed and reduced; and a suit was subsequently commenced by C. against B., the object of which was to set aside the agreement, and in which A. and D., who had lately become his partners, were solicitors for C.; the Court restrained A. and D. from communicating to C. any information relating to the agreement that had come to his knowledge confidentially as the solicitor of B. The Vice-Chancellor, Sir L. Shadwell, said that he could not consider anything to be a greater breach of professional duty than for a solicitor, first of all, as the solicitor of one party, to carry on a negotiation for the benefit of that party, and have it completed, and afterwards to act as the solicitor for other parties in order, by his own personal knowledge of the transaction, to destroy that which he had done for his former client; and that not because he was discharged by his former client, but because he made an exorbitant demand, which was resisted and ultimately defeated, so that he virtually discharged himself; and that such conduct appeared to him to be such a flagrant breach of that duty which a solicitor owes to his client, that the Court was bound to interfere. But a clerk to a solicitor commencing practice for himself will not be restrained from acting as solicitor for parties against whom his master was employed, upon general allegation of his having in his former service acquired information likely to be prejudicial to the clients of his master (1). And in *Ber v. Ward* (2) the Court, upon motion, refused to restrain a solicitor from giving evidence of confidential matters, the propriety of his being examined being left to the consideration of the Court before which he might appear as a witness. Though if a solicitor, who has been discharged, voluntarily makes communications of what has come to his knowledge confidentially, it is a great breach of his duty; and, *semble*, the Court would restrain the solicitor from making such communications (3). And where a solicitor had acted to a certain extent only for parties, defendants in an amicable suit in Chancery, the Court dissolved an injunction to restrain him from acting in a cause where a bill had been filed by some of those defendants against others of them, the solicitor making an affidavit that he was not confidentially possessed of any secrets

(1) *Bricheno v. Thorp*, Jac. 300.

(2) Jac. 77.

(3) *Id.*

which might be used to the prejudice of such other defendants, and that he had no knowledge of any facts unknown to his clients (1). But in *Cholmondeley (Earl) v. Lord Clinton* (2) it was held that an attorney or solicitor discharging himself, or being removed by the effect of an agreement made upon a dissolution of partnership, and not by the discharge of the client, was not in the situation of a solicitor discharged by the client, and therefore could not become the solicitor of the other party in the same cause. And so a solicitor voluntarily changing his situation would be prevented from giving evidence of his client's secrets, or from proceeding to communicate a material fact, even by striking him off the rolls (3). And solicitors in partnership cannot dissolve their partnership as against their client without his consent, so as to enable the retiring partner as discharged to act against him (4), or so as to turn over their client to one of themselves. (5). And the practice of solicitors, partners, dividing their business, considering one only as agent to the other, was disallowed, the client being entitled to their united exertions. The Lord Chancellor, Lord Eldon, said that, as between themselves they might make that agreement, but that they could not be heard to say so in a Court of Justice (6).

4. Where an attorney had delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds were of great use to the executor in several suits which were then carrying on, this was held to be a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not, and an order of the Exchequer, refusing an injunction to stay the attorney's proceedings on a judgment at Law, was affirmed by the House of Lords (7).

5. Where in a suit against an attorney for the purpose of having his bill of costs on the plaintiff taxed, and for an injunction against his proceeding at Law in the meantime, the defendant moved that the costs both at Law and in Equity might be taxed as between attorney and client; the Court said that the rules of taxation of costs as between attorney and client did not apply when they

(1) *Robinson v. Mullett*, 4 Price, 353.(5) *Cook v. Rhodes*, 19 Ves. 273, n.

(2) 19 Ves. 261.

(6) *Cholmondeley (Earl) v. Lord*(3) *Id.* 268.*Clinton*, 19 Ves. 273.(4) *Cholmondeley (Earl) v. Lord Clinton*, 19 Ves. 273.(7) *Hamilton (Duchess of) v. Ingleton*, 4 Bro. P. C. 4.

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appear in the court as party and party in a cause, and that these costs, therefore, must be taxed as between party and party (1).

6. Where the solicitor and client settled an account, and a mortgage security was given, with a covenant to pay, and the solicitor having sued on the covenant, the defendant filed a bill impeaching the transaction on the ground of surprise, undue influence, errors, and omissions and exorbitant charges in the accounts and bill of costs respectively, all which was denied by the answer; the Court, upon a motion under the then practice, made on the merits confessed by the answer, and not on proofs in the cause, refused an injunction, with costs. The Master of the Rolls, Lord Langdale, observed, that the Court would look closely at a transaction between solicitor and client; but in the absence of fraud could not treat it as a nullity, and that there was nothing in this case as it stood but the fact of the dealing having been between solicitor and client (2).

7. The Court, in *Wiggins v. Peppins* (3), on motion, refused an injunction to restrain a solicitor from proceeding to recover the amount of a bill of costs, although much the greater part of the bill consisted of charges in respect of proceedings improperly taken by the solicitor, some few of the items of trifling amount appearing to be due from, and improperly claimed against, the client.

8. A solicitor who had established in a suit the claim of his client to a sum of money, and was unable to obtain payment of his taxed costs, or to serve a writ upon his client for that purpose, was held by Vice-Chancellor Sir J. Stuart, upon application *ex parte*, to be entitled to an interim order to restrain the payment of the dividend and delivery of the cheque to the client by the Accountant-General of a dividend in the suit, until a petition under the Attorneys and Solicitors Act (23 & 24 Vict. c. 127) to establish a lien for costs could be served and heard, the solicitor giving an undertaking to abide by any order the Court might make as to damages (4).

(1) *Spelman v. Woodbine*, 1 Cox, 49.

(2) *Jones v. Roberts*, 9 Beav. 419.

(3) 2 Jur. 320.

(4) *Gerrard v. Dawes, Dawes, In re*,

18 W. R. 32; 21 L. T. (N. S.) 322.

SECT. 15. *Executors—Administrators.*PART I.
CHAPTER IV.

1. Although executors can make an assignment and give a receipt for the purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-money till probate; because till the evidence of title exists the executors cannot give a complete indemnity. But where a testator had contracted for the sale of leaseholds to a company, but died before payment of the purchase-money, Vice-Chancellor Sir R. T. Kindersley held, that the executors could obtain an injunction to restrain the company from taking possession of the leasehold houses before obtaining probate (1).

2. In *Brooker v. Brooker* (2) Vice-Chancellor Sir J. Stuart granted, on motion, an order for an injunction and receiver, as against an administratrix of a deceased intestate, after the common decretal order made upon summons for taking the simple administration accounts; a case of misconduct and wilful default against the administratrix having come to light in the course of the proceedings under such decretal order.

3. Upon a bill by two of the residuary legatees under the will of Henry Stainton against the Carron Company, the legal personal representatives of the testator, and other defendants interested under the will (twenty-six in all), having for its object to take the accounts and settle the transactions and dealings between the testator and the company, praying (*inter alia*) that the company might be compelled to put an end to their proceedings in Scotland, and to relieve the trustees and executors and the testator's estate from the effects thereof, including costs, and for an injunction to restrain the company from availing themselves of the provision for forfeiture contained in their charter, and from continuing an inhibition and arrestment in Scotland, and from hindering the executors and trustees from dealing with the property of the testator in Scotland according to the trusts of his will; and the company having demurred to the bill, the question being, whether upon the facts therein stated the plaintiffs were justified in suing instead of the executors; the Master of the Rolls, Sir J. Romilly, held, that the personal representatives are the proper parties to sue to recover

(1) *Newton v. Metropolitan Railw. Co.*, (2) 26 L. J. (Ch.) 411; 3 Sm. & 1 Dr. & Sm. 583; 3 Jur. (N. S.) 738. Giff. 475.

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the assets, and that parties interested in the estate will not be allowed to sue for that purpose unless it be satisfactorily shewn that assets exist which might be recovered, and which but for such suit would probably be lost to the estate; but that the rule as to joining the partner of the deceased with the personal representatives in a suit for administration, without charging and proving collusion (if it can be supported in the absence of any additional special circumstances), does not apply to such a partnership as a joint stock company (1); and that after a decree for administration a legatee cannot sue the debtors to recover the assets, in the absence of any refusal or neglect of the personal representatives to do so. And in this case where, after a decree for administration, a residuary legatee had filed a bill against the executors and a company in which the testator was a large shareholder, and with which he had had extensive transactions, to recover the assets, relying on the fact that the executors were shareholders and officers of the company, and had interests which conflicted with their duty, the demurrer of the company was allowed, it not being shewn that the executors intended to neglect the performance of the duties of their office (2). And if a testator when he makes his will is aware of the circumstances and position of his executors and trustees, the Court will not lightly interfere with their discretion; and although the circumstance of an executor being an insolvent may be a reason for appointing a receiver, yet if the testator was aware of his insolvency the Court will not, on that ground alone, take the property out of his hands (3); the Master of the Rolls said that he thought it his duty before pronouncing any decision carefully to consider the cases, which were numerous, where the plaintiffs had been allowed to enforce claims the right of doing which was vested in another, so far as those cases related to the assets of deceased persons, and that the general principle was, in his opinion, correctly stated by Lord Justice Turner in the case of *Travis v. Milne* (4), where he says: "Upon an examination of the authorities I believe it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which

(1) *Stainton v. Carron Company*, 18 Beav. 146.

(2) *Ib.*

(3) *Ib.*

(4) 9 Hare, 149.

such a bill can be supported. The cases, I think, may fairly be considered to go to this extent: that such a bill may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners." The Master of the Rolls further on said, that he thought it unnecessary to go in detail through all the cases to be found on this subject; but that he thought that they might be summed up thus: that the persons interested in the estate of the testator not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would probably be lost to the estate.

4. Where a person holding, by the warrant of Her Majesty, the office of judicial assessor to the native princes, and being also chief judge of Her Majesty's dominions on the Gold Coast of Africa, took possession of the personal effects of a British subject who died intestate, domiciled in Cape Coast Town, in Africa, and claimed to be the official administrator of these assets by usage, in his capacity of official assessor, and, as such, to be entitled to $7\frac{1}{2}$ per cent. commission upon them; and he afterwards transmitted goods, part of the assets, to this country to be sold and the proceeds carried to the account of the intestate's estate; and came to this country himself, on leave of absence, for a short time; and the father of the intestate, being his sole next of kin, obtained letters of administration to him in England, and filed his bill against the judicial assessor for administration and an injunction to restrain the defendant F. (the assessor) from receiving the proceeds of the goods, and the brokers from paying the proceeds to him, and for a receiver of the proceeds; upon motion for an injunction in the terms of the prayer, Vice-Chancellor Sir W. P. Wood held, that the Court of Chancery had jurisdiction to sustain the application, as the assets and the judicial assessor were both in this country, whatever might be the nature of his authority; and that there being the danger of his taking the assets again out of the jurisdiction, although he might be the proper representative of the intestate in Africa, a good case was made for the appoint-

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ment of a receiver. The Vice-Chancellor, in his judgment, said: "There is the question, whether or not, when the property of a deceased person has been remitted by such a representative (*i. e.*, a personal representative legally constituted by a Court of Her Majesty in the district of an African prince) to this country in such manner as here, with a letter requesting the agent of the foreign administrator to place the proceeds of the same to the account of the estate, a person appearing to proceed in the character of *English* administrator and sole next of kin of the deceased has not a right to sue the foreign representative of the deceased in this country in respect of those assets which are in this country, and to have the control of this Court exercised over them until the rights are determined at the hearing. I think it seems clear that he has such a right" (1).

5. A suggestion by the trustees of a fund that the administrator of one of the *cestuis que trust* who, in that character, was entitled to a distributive share of the fund, has unfairly obtained the letters of administration under which he claimed such share, is no defence in this Court to a claim of the administrator; nor is it a defence for trustees to suggest that a deed under which the plaintiff derives his title from the *cestui que trust* was founded on mistake, or is otherwise subject to be displaced; for it is contrary to the course of the Court to direct an inquiry as to the validity or invalidity of a deed upon a suggestion in the answer of the defendants, the trustees of the fund to which it relates, where the ascertainment of the validity or invalidity of the deed is not essential to the safety of the defendants; and the fact of a bill having been filed to set aside the deed under which the claim is made, or to exclude the fund in question from its operation, is not a ground upon which the trustees can resist the legal title to receive the fund, for the Court cannot give the plaintiff in such other suit the benefit of an injunction to protect the fund upon the suggestion in the answer of the trustees, but the existence of such other suit entitles the trustees to retain such a portion of the trust fund as may be sufficient to answer their costs of such other suit (2).

6. Where administration was granted by the sentence of the Ecclesiastical Court to A., as only next of kin of the intestate, in

(1) *Hervey v. Fitzpatrick*, Kay, 421. (2) *Devey v. Thornton*, 9 Hare, 22.

a suit in which B. also claimed to be the only next of kin, and that sentence was affirmed by the Court of Delegates on appeal; and B. filed a bill impeaching the pedigree of A., and to establish his own, the Court would not in such case grant an injunction until answer to prevent the administrator from possessing himself of the assets, he being, by the decree of the Ecclesiastical Court, both legally and equitably entitled thereto (1).

7. Where a decree for the administration of a testator's estate was obtained in a creditors' suit, which decree did not bind the testator's real estate, the Court refused to prevent a second suit for the administration of the estate of the same testator from being prosecuted (2).

8. In *Mansfield v. Shaw* (3) the Court granted an injunction to restrain the defendant, who was alleged by the bill to have improperly obtained probate, and to be insolvent, from receiving the testator's assets, and from prosecuting actions at law against debtors for that purpose, and granted it under the circumstances (*ex parte*) before answer. In *Scott v. Becher* (4), it is put as a *semble*, that an injunction restraining an administrator from transferring the intestate's stock into his own name will, by equitable construction, operate to prevent his parting with any of the intestate's outstanding estate, which has previously come to his hands.

9. In *Kilby v. Stanton* (5), where two executors were appointed, and one proved, and the other declined to act; and an action was commenced by the acting executor against a debtor to the testator; and the rule of law requiring all the executors to join, the action was brought in the name of both of the executors; and on a bill filed by the debtor he obtained the common injunction for want of answer, and the acting executor subsequently put in an answer; on an affidavit that the other executor, who resided abroad, refused to act or put in any answer, the Court granted an order *nisi* to dissolve the injunction.

10. After the usual decree has been obtained in a creditors' suit this Court will stay all further proceedings in an action by a creditor against the executor upon payment to the creditor of his costs of

(1) *Maher v. Gorman*, 6 Ir. Eq. Rep. 304. (2) *Jones v. Cook*, 11 L. J. (N. S.) Ch. 15.

(3) 3 Madd. 100.

(4) 4 Price, 346.

(5) 2 Y. & J. 75.

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the action up to the time when he had first notice of the decree, although the executor may have pleaded *plene administravit*, and issue may have been joined on such plea. The Lord Chancellor, Lord Lyndhurst, in his judgment, said: "The result, therefore, is, that if the action should be allowed to proceed to judgment and execution on this plea, and the jury should falsify the plea, and find that there are assets, those assets would be withdrawn from the general fund, which ought to be distributed in this Court for the common benefit of all the creditors." And further on he said: "It is to be observed that the plea was not filed in this case till after the decree was obtained and notice of it served; and it is obvious that it was filed merely for the purpose of enabling the executors to apply by motion to this Court to stay the proceedings. If the executors had suffered judgment by default, which they might have done, execution would probably have issued before the motion could have been made. Then as to the affidavits, the Court in these cases requires to be informed of the state of the assets before it will stay the proceedings at Law: *Paaton v. Douglas* (1). I have read the affidavits, and, adverting to the nature and state of the property as therein described, I think the account given of it on the part of the executors is satisfactory, and all that could at that period be reasonably required;" and the motion, by way of appeal to discharge an order for an injunction to restrain proceedings in the action made by Vice-Chancellor Sir L. Shadwell, was refused with costs (2).

11. Where A., in consideration of being permitted to become administrator of an intestate, agreed to deposit the share of C., a minor, and one of the next of kin, in the hands of a trustee for him, and accordingly deposited £180 with B. in trust for C., subject to the final settlement of the administrator's account; and the share of C. was afterwards ascertained to be £156; and having proceeded at Law to recover the £180 from B., and having refused a tender of the difference between £180 and £156, B. was, on a bill filed by him, allowed to lodge £180 in Court to the credit of the cause, and A. was restrained from proceeding in the action (3).

(1) 8 Ves. 520.

14 L. J. (N. S.) Ch. 83; 7 Jur. 503.

(2) *Vernon v. Thelluson*, 1 Ph. 466;

(3) *Fleming v. Fleming*, 2 Jones, 810.

12. The pendency of a suit in the Ecclesiastical Court to have a probate or letters of administration recalled, is not of itself a sufficient ground to induce the Court to grant an injunction and receiver against the personal representative. And in *Connor v. Connor* (1), where a bill was filed by a person who described herself as the widow of an intestate, against his mother and sister (the former of whom was his administratrix), for the administration and distribution of his estate, and for an injunction to restrain the mother from selling or transferring a sum of stock, part of the intestate's estate, and from getting in his outstanding estate, and for a receiver; and the only ground on which the application was made was the pendency of a proceeding instituted by the plaintiff in the Ecclesiastical Court to have the letters of administration recalled; and there was no allegation that the administratrix was insolvent, or had wasted or had misapplied the assets, or that she had obtained the letters of administration by fraud; and Vice-Chancellor Sir L. Shadwell made the order; the Lord Chancellor discharged it on the administratrix consenting to transfer the stock into Court. And in *Watkins v. Brent* (2) it was held that the institution of a suit in the Ecclesiastical Court for the purpose of recalling probate is not a ground upon which alone this Court will interfere to restrain the executor from receiving the assets. Where, however, the executor had agreed, through his proctor, that the validity of the testamentary paper by which he was appointed should be tried in the suit to recall probate, an order was made for an injunction and a receiver, and that order was affirmed on appeal (3). And where a will was litigated in the Spiritual Court, on a suggestion that it was unduly obtained from a man sick of the plague, the Court, on the motion, ordered that the executor (who was supposed to be insolvent) should forbear to receive the debts of the deceased *pendente lite* (4). A clear and strong case must be made out for the Court to order an administrator to bring in personal estate unapplied (5); but the Court will appoint a receiver of an intestate's personal estate if the administrator is sworn to be insolvent, before his answer

(1) 15 Sim. 598.

(2) 1 My. & Cr. 97; 7 Sim. 512.

(3) *Ib.*(4) *Smallpiece v. Anguish*, 1 Ch. Ca. 75.(5) *Scott v. Becher*, 4 Price, 346.

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comes in, although the fact of his being abroad (stated in the plaintiff's affidavit) is denied (1).

13. But in *Otley v. Lines* (2) the Court allowed a general demurrer to a bill filed by a judgment creditor against his debtor (who had been discharged under an Insolvent Act) and the executrix of a will, by which the debtor was entitled to a share of the residue of a testator's personal property, praying an injunction against the executrix to restrain her paying it over to the debtor, and that the plaintiff might be allowed his debt thereout, because a sufficiently strong case had not been made out.

The Court will restrain insolvent executor getting in assets before probate.

14. Where an insolvent executor is getting in the assets before probate, the Court will restrain him, and direct the money to be paid into the bank (3).

15. The effect of a decree against an administrator entitling him to an injunction against the suit of a creditor, is qualified by requiring an account of the assets, either by his answer or affidavit (4).

Distribution of the personal estate will be according to the law of the domicile, and that, though probate of the will has been granted in another country.

16. Where a party domiciled in one country has personal estate in another, though probate of his will in the latter country may be granted for the purpose of getting in his estate, yet such probate must be treated as ancillary to the law of the country of the domicile, and distribution of the estate ought to be directed accordingly. And where a British subject domiciled in France made, during a short visit to England, a will inconsistent with French law, which will was admitted to probate in the Prerogative Court; on a motion being made for an injunction to restrain the executor so appointed from getting in the estate, it was held that the Court was not at liberty to question the validity of the appointment of executor; but that, on a suit properly framed, distribution might be compelled according to the French law (5).

This Court will not question the validity of the appointment of executor.

The Court will restrain actions against executors after a decree.

17. Where a creditor after a decree (in obedience to which the executor pays away assets) obtains judgment to which the decree was not pleadable, Equity will relieve the executor (6). And where executors had pleaded the decree in an administration suit

(1) *Scott v. Becher*, 4 Price, 346.

(2) 7 Price, 274.

(3) *Smith v. Aykwell*, 3 Atk. 566.

(6) *Bank of England v. Morrice*, 2 Bro. P. C. 465; Forrester, 218.

(4) *Gilpin v. Lady Southampton*,

18 Ves. 469.

(5) *Thornton v. Curling*, 8 Sim. 310.

to an action brought by a creditor, which plea was held bad by the Court of Law and judgment given for the plaintiff, this Court restrained the latter from proceeding against the assets of the testator, but would not deprive him of any right at Law the judgment might give him against the executors personally. The Vice-Chancellor (Sir L. Shadwell), in his judgment, said: "In *Kent v Pickering* (1) I proceeded on what Lord Eldon is reported to have said in *Brook v. Skinner* (2), namely, that where a decree has been made in a suit for the administration of a deceased debtor's estate, if the plaintiff at Law recovers a judgment *de bonis testatoris*, this Court will not suffer execution to be taken out on such judgment; but if he recovers *de bonis testatoris, et si non, de bonis propriis*, this Court cannot interpose to protect the executors from any liability to which they may have subjected themselves. The rule of this Court, as I apprehend, is, that if the executor does, at Law, so manage the matter as to make himself personally liable, this Court will leave him to be dealt with at Law as the Court of Law will permit; but this Court will not suffer any judgment that may be recovered at Law to interfere with its own decree. In this case I think that the executors, instead of pleading the decree at Law, ought to have applied at once for an injunction; but as they thought fit to adopt a different course, the plaintiff at Law is entitled to have the benefit of his judgment as against them; but this Court will restrain him from using it against the assets of the testator; and, therefore, I shall grant an injunction to restrain him from proceeding against the assets, but not to restrain him from proceeding against the executors personally." (3) And if an executor pleads *non est factum* only to a bond, and not *plene administravit* likewise, he cannot after verdict take advantage of what might have been pleaded to the action. The plea of *non est factum* is an admission of assets, and he can be relieved only against the penalty of the bond by paying principal and interest, without regard to his having assets or not (4). And in an anonymous case, in *Vernon* (5), where an executor pleaded *riens entre mains ultra* £100 to three several actions, and so upon each action

(1) 5 Sim. 569.

(3) *Burles v. Popplewell*, 10 Sim.

(2) 2 Mer. 481, n.

383.

(4) *Ramsden v. Jackson*, 1 Atk. 294.

(5) Vol. i. p. 119.

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there was a judgment for £100, and then filed his bill and moved for an injunction; the Lord Keeper refused it, holding that in cases proper for Law a man must defend himself by legal pleadings, and that every executor ought to be careful, in the first place, to cover all his assets with a judgment.

18. Where, before the usual decree for an account in a suit by legatees against executors, a judgment had been obtained at Law against them *de bonis testatoris, et si non, de bonis propriis*; a motion after decree to restrain execution upon such judgment was refused with costs, it appearing by the answer of the executors that they had, in fact, misapplied the assets (1).

19. In *Edmunds v. Bird* (2) Vice-Chancellor Sir T. Plumer granted an injunction to restrain an executor, claiming under a will and also by gift from the testatrix in her lifetime, from converting furniture and other specific property into money, upon affidavits of undue influence.

20. Where an executrix in custody under a writ *de excommunicato capiendo*, issuing from the Ecclesiastical Court, for not appearing to a citation by a creditor to exhibit an inventory, moved for a *supersedeas* of the writ, disputing the debt upon equitable grounds; the motion was refused, the Lord Chancellor observing that the application to him was totally destructive of the jurisdiction of the Ecclesiastical Court to call upon a representative to give an account of his assets (3).

21. Where there was a transfer of stock of an intestate into the name of himself jointly with that of the husband of one of his two nieces, accompanied with proof of his having said in his life-

(1) *Lee v. Park*, 1 Keen, 714.

(2) 1 V. & B. 542.

(3) *The King v. Blatch*, 5 Ves. 113.

This case shews the difference between a proceeding in the nature of a prohibition (as this is) and an injunction. "A prohibition is a remedy against an encroachment of jurisdiction, issues only from a superior Court, is granted on the suggestion that the Court to which it is directed has not the legal cognizance of the cause, and is directed to the judge of the inferior

Court, as well as to the parties in the cause. An injunction, on the other hand, where its object is to restrain proceedings in another Court, is directed only to the parties; neither assumes any superiority over the Court in which they are proceeding, nor denies its jurisdiction; but is granted on the sole ground that from certain equitable circumstances, of which the Court that issues it has cognizance, it is against conscience for the party to proceed in the cause." *Eden, Inj.* 4.

time that it was his intention to give the husband the stock at his death, in consideration of affection, &c., and that he had transferred it for that purpose; it was held (if not repelled by counter testimony) to be sufficient proof of a gift of such stock; and the Court would not continue an injunction granted to restrain the husband, who had administered, from disposing of it (1).

22. The institution of a suit in the Ecclesiastical Court for the purpose of recalling probate does not give this Court jurisdiction ("it would be different if there were fraud," Pepys, Lord Com.), and is not a ground upon which alone this Court will interfere to restrain the executor from receiving the assets. Where, however, the executor had agreed, through his proctor, that the validity of the testamentary paper by which he was appointed should be tried in the suit to recal probate, an order was made by Vice-Chancellor Sir L. Shadwell for an injunction and a receiver, and that order was affirmed on appeal by the Lords Commissioners. Lord Commissioner Pepys said: "There is no doubt that by the rule of this Court, if the representation is in contest, and no person has been constituted executor, the Court interferes, not because of the contest, but because there is no proper person to receive the assets. If there be a contest who shall be executor or administrator, and there is nothing to shew who is entitled to be considered as sustaining either of those characters, the interference of this Court is quite of course. Lord Erskine thought that a reason against interference existed whenever the Ecclesiastical Court could commit administration *pendente lite* (2); but *Atkinson v. Henshaw* (3) has decided that there is nothing in that distinction"—and that in the present case there was no ground for interference on account of the improper conduct of the parties (4).

23. Upon a bill for an account of the personal estate come to the hands of the defendant, and for a receiver and an injunction, until the grant of letters of administration, against an executor *de son tort*, and administration was taken out by another person after the bill had been filed; Vice-Chancellor Sir W. P. Wood held, on demurrer for want of equity to the amended bill, that the admini-

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This Court will not restrain executor from receiving assets merely because a suit is instituted to recall the probate, except (*inter alia*) there is fraud, or (as here) an agreement that the validity of the paper appointing him should be tried.

- (1) *George v. Howard*, 7 Price, 646. (4) *Watkins v. Brent*, 1 My. & Cr.
(2) *Richards v. Chave*, 12 Ves. 462. 97; 7 Sim. 512.
(3) 2 V. & B. 85.

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strator might be properly made a party by amendment. The bill was amended by stating that no grant of administration had been made at the time of filing the bill, but that since that time letters of administration had been granted to Ann Smith, and that an order for a receiver and injunction had been made, by adding Ann Smith and her husband as defendants, and by praying an account of the personal estate against the new defendants, as well as against the original defendant. The Vice-Chancellor, in his judgment, said: "The plaintiffs in the first instance had a clear right to file this amended bill. It asks relief against the administrator. The original bill was against the executor *de son tort* alone, and it is quite clear that that bill might have been demurred to if it had asked simply for an account and administration. Now, if the plaintiff is entitled at any stage of this suit to have the administrator before the Court the demurrer must be overruled. It cannot be disputed that the personal representative is a necessary party to a suit in which an account is asked of the receipts of an executor *de son tort*" (1). And in *Overington v. Ward* (2) it was, upon demurrer, held by the Master of the Rolls (Sir J. Romilly), that a bill to protect a testator's estate until a legal personal representative has been appointed, and also to administer the estate, is irregular, and that it should be limited to the first object; but the Master of the Rolls gave leave to amend the bill by striking out the paragraph of the prayer of the bill asking for the administration of the real and personal estate, but said he would give no costs. In *Smith v. Tebbitt* (3) the Court of Probate—the judge stating that the Court would for the future assimilate the practice of that Court to that of the Court of Chancery, and grant administration *pendente lite* wherever the Court of Chancery would appoint a receiver—granted administration *pendente lite*, but ordered the administrator not to remove property (diamonds) deposited at the Bank of England after the death of the deceased, and directed the administrator to invest the rents as he received them.

24. When an administratrix of an intestate is sued by a creditor as administratrix, she may obtain an order for taking the accounts,

(1) *Beardmore v. Gregory*, 2 H. & M. 491.

(2) 34 Beav. 175.

(3) 16 L. T. (N. S.) 896.

and then for an injunction to restrain such action pending the taking of such accounts, under 23 & 24 Vict. c. 38, s. 14 (An Act to further amend the Law of Property), she undertaking to be answerable in damages, and the affidavit of her solicitor is sufficient (1).

25. It is not a violation of an injunction restraining a party from suing the executors or other representatives of the testator, to sue the heirs (2).

26. Where an executor in the United States, residing out of the state, and being insolvent, is seeking to obtain a fund belonging to the estate, which it is feared may be wasted, Equity may and ought to restrain him by injunction from prosecuting his proceedings at Law until he submits himself to the jurisdiction of the Court (3).

27. A suit brought by an administrator for the sole benefit of persons neither parties nor privies, and having no title themselves, in order to enable them to use the intestate's title against the tenant in possession, will be enjoined (4).

SECT. 16. *Devisee.*

1. Where upon a bill to establish a will and to have the trusts executed, an issue *devisavit vel non* had been directed to be tried at the bar of the Court of King's Bench, and there was a verdict by a special jury in favour of the will; and upon the hearing the cause on the equity reserved the will was decreed to be established, and the trusts to be executed, and the necessary accounts to be taken, which were executed and taken accordingly; and afterwards the testator's heir-at-law died, having by his will devised the residue of his real estate to one of the defendants, his second son; and the defendants, notwithstanding the decree, having brought an ejectment against two of the tenants of part of the estate, the plaintiffs filed their bill in this Court for an injunction to stay them from

(1) *Cole, In re*, 17 L. T. (N. S.) 494.

(2) *Dalp v. Roosevelt*, 1 Paige, 35 (Amr.)

(3) *Dougherty v. Walker*, 15 Geo. 442 (Amr.)

(4) *Pierce v. Jones*, 23 Geo. 374 (Amr.)

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proceeding at Law for recovery of any part of the estates devised by the will of the original testator; Lord Chancellor Bathurst at the hearing decreed the injunction granted in this cause for stay of the defendants' proceedings at Law for and touching any of the matters therein in question to be perpetual, but did not give costs on either side (1).

2. Where one accepts land devised to him, on condition of ratifying a previous sale by the testator, and sells portions thereof; he may be perpetually enjoined from proceeding at Law to avoid the sale by the testator (2).

SECT. 17. *Sovereign—Sovereign Prerogatives.*

The right to regulate coinage and issue of notes is part of the sovereign prerogative.

This Court will protect from invasion a foreign sovereign's prerogative right of issuing coin or paper-money—and the property to which he is entitled as sovereign, and that of his subjects represented by him.

1. The right to regulate the coinage and issue of notes for payment of money, as part of the circulating medium, is part of the sovereign prerogative recognised by the law of nations, and the law of nations is part of the Common Law of England; and money being the medium of commerce, a foreign sovereign in amity with this country suing in the Court of Chancery to protect his prerogative right of issuing coin, or paper money, will have his right protected from invasion; and the Court will protect the property to which he is entitled as sovereign, or of his subjects, being represented by him, where a damage to such property is done or threatened by persons resident within the jurisdiction of the Court, and such injury is alleged in the bill. And where the defendants, resident in this country, had manufactured a large quantity of documents which purported to be the notes of a foreign state, the kingdom of Hungary, in order to use it, when opportunity should occur, for purposes hostile to the sovereign ruling power of that kingdom, they were—at the suit of the Emperor of Austria as King of Hungary, alleging that the introduction of such notes would cause great detriment to his subjects, on the ground of preventing an injury and damage to the property of the plaintiff as sovereign, and to the property of his subjects, whom he had a right to represent in an English Court of Justice, and upon the

(1) *Lowe v. Jolliffe*, Dick. 388.

(2) *Leonard v. Crommelin*, 1 Edw. Ch. 206 (Amr.)

ground of injury to the subjects of the plaintiff by the introduction of a spurious circulation—decreed to deliver up the notes and the plates from which the notes had been manufactured to be destroyed; and the defendants were restrained by a perpetual injunction from manufacturing documents purporting to be notes of that state (1). But, *semble, per* Lord Justice Turner, differing from Vice-Chancellor Sir J. Stuart, the Court will not interfere to protect the invasion of a mere sovereign right, nor interfere in aid of the prerogative of a foreign sovereign (2). And the Court of Appeal, overruling Vice-Chancellor Sir J. Stuart's decision on this point, refused to interfere to prevent the use in this country of the royal arms of Hungary; and the decree of the Vice-Chancellor prohibiting the defendant Kossuth from the use of the royal arms of Hungary was varied in that respect, the Lord Chancellor, Lord Campbell, observing that it would appear that they might be innocently used by all Hungarians, and, he presumed, by all mankind (3).

2. Where the East India Company, in its sovereign capacity, had attacked, defeated, and made prisoner a native sovereign, and at the same time had captured as booty of war some property being *jura regalia* of the raj, and the ex-rajah filed a bill for relief with respect to such property; the Master of the Rolls, Sir J. Romilly, held, that the Court had no jurisdiction to interfere; as Courts of Law cannot take cognizance of acts of power exercised by governments in matters of state arising out of war. Courts of Law cannot take cognizance of acts of power exercised by governments in matters of state arising out of war.

Courts of Law cannot take cognizance of acts of power exercised by governments in matters of state arising out of war, but they will preserve the private rights of sovereign princes, if by so doing the sovereign acts of the state are not interfered with. In this case, in 1834, the East India Company conquered and annexed Coorg, and took the rajah prisoner—he was then the owner of two government promissory notes of the East India Government. Some time after the annexation the Company took possession of the notes, and detained the ex-rajah in India as a captive until 1852, when he was allowed to come to England for a short visit. During his residence in England he instituted a suit against the company praying that the promissory notes or securities might be given up to the plaintiff, and for an account and payment of what

(1) *Emperor of Austria v. Day and Kossuth*, 2 Giff. 628; 7 Jur. (N. S.) 483; 9 W. R. 568; 7 Jur. (N. S.) 639; 30 L. J. (Ch.) 690.

(2) *Ib.*

(3) *Ib.*

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Transactions of independent sovereign states between each other are governed by other laws than those which municipal Courts administer.

should be found due for principal and interest, and that the defendants might be restrained from cancelling or erasing the name of the plaintiff from the books of the public debt of the company; upon the ground that the notes were his private property, and that they were not capable of seizure, and had not been confiscated as prize of war, being debts to which the public faith of the British Government in India was pledged; but the Court held, that the notes belonged to the ex-rajah as part of the raj, and that the British Government in India having taken possession of them in the exercise of its sovereign and political power, that was an act which was not subject to the control of the Court (1). And in *Secretary of State for India v. Kamachee Boye Sahabor* (2) it was held that transactions of independent sovereign states between each other are governed by other laws than those which municipal Courts administer, and that such Courts have neither the means of decreeing what is right, nor the power of enforcing any decisions which they may make.

SECT. 18. *Ambassadors.*

The Courts here cannot make an order against a foreign ambassador who does not submit to the jurisdiction; but Chancery can restrain a third party handing a fund to him the right to which is in dispute.

1. Although the Courts in this country cannot make an order against a foreign ambassador who does not submit himself to the jurisdiction, yet the Court of Chancery will restrain a third party from handing over to him a fund the right to which is in dispute, notwithstanding his title to the fund may be absolute at Law. And where certain securities had been deposited by the plaintiffs in the Bank of England in the name of the ambassador of a foreign state, in order to secure the performance of a contract between the plaintiffs and a foreign government, and the ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract by the plaintiffs, which they denied, under the circumstances, to be such breach; Vice-Chancellor Sir W. P. Wood held, that it was not competent for the plaintiffs to move against the ambassador, but that an *interim* injunction might be granted against the Bank

(1) *Wadeer v. East India Company*, 7 Jur. (N.S.) 350; S. C. *sub. nom. Veer Rajundur Wadeer v. East India Com-*

pany, 30 L. J. (Ch.) 226; 9 W. R. 247.
(2) 13 Moo. P. C. 22; 7 Moo. Ind. App. 476.

to restrain them from parting with the fund, and that under this order the Bank would be protected against any proceedings by the ambassador (1).

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2. In *Service v. Castaneda* (2) it was held that an injunction could not be sustained against the agent of a foreign government whose business in this country was only that of settling certain claims (in respect of one of which the injunction was asked) upon the foreign government, but whose acts in that capacity were done entirely under the ambassador of the foreign country resident in this country.

There can be no injunction against an agent of a foreign government acting¹ under the ambassador of that country.

SECT. 19. *Magistrates.*

1. The 21 Geo. 3, c. 70, s. 24, protects provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their offices, giving them only the same measure of exemption as that which is given to magistrates in England under similar circumstances, that is, an exception in cases where they have acted *bonâ fide*; but where they have exceeded their jurisdiction, the onus of shewing that they knew, or had the means of knowing, the want of jurisdiction, lies upon the party complaining (3).

2. In *Frompton v. Tiffin* (4) the Vice-Chancellor said, that he thought that the magistrates had no power, under the 5 & 6 Will. 4, c. 50, to cut down trees, which might damage the highway if they had been planted for ornament or shelter; and the Vice-Chancellor refused to dissolve an injunction which had been obtained to restrain the defendant, a person who was acting under the parish authorities of H., from cutting down, &c., trees before the plaintiff's house, until an application had been made to the magistrates.

Magistrates (here) restrained cutting, &c., trees planted in the highway.

3. Though the 20 & 21 Vict. c. 43, s. 6, enacts that the decision of the Superior Court on the question of law raised by a special case stated by justices "shall be final and conclusive on all parties;" the Lord Chancellor of Ireland held, that, notwithstanding these words, the Irish Court of Chancery had jurisdiction to

(1) *Gladstone v. Musurus Bey*, 1 H. & M. 495; 9 Jur. (N. S.) 71; 32 L. J. (Ch.) 155.

(2) 2 Coll. 56.

(3) *Calder v. Halkett*, 3 Mont. 28.

(4) 2 Jur. 986.

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allow the party at whose instance the special case had been stated liberty to declare in prohibition (1).

SECT. 20. *Felons—Felony.*

Though a felon cannot be sued in respect of a felony, if the felon be dead before felony discovered, there may be remedy in respect of the felonious act.

1. Where the clerk to a banking firm, who had misappropriated the money of the firm, died, before the fraud had been discovered, intestate, having considerable property, which was placed by the widow in the custody of the bank; and she had subsequently obtained administration of his estate, and to recover the property had commenced proceedings against the bank, who filed their bill for an injunction and administration of the estate; Vice-Chancellor Sir J. Stuart overruled with costs a demurrer by the administratrix which had been made to the bill, on the ground that the bill alleging a felony no civil remedy lay in respect thereof (2). The Vice-Chancellor said: "The rule of law, that a felon cannot be sued upon a civil action in respect of a transaction which amounts to felony, is a rule of public policy. The reason of the rule is, that persons who have been defrauded by felonious acts should do their duty to the public by prosecuting for felony before they seek redress for the private injury to themselves in a civil Court;" but "where public policy ceases to require its operation, the rule ceases to operate also" (3); and the Vice-Chancellor said that in this case the clerk who committed the act said to be felonious died before the felony was discovered, and the operation of the rule of public policy never was required, and the prosecution for felony had become impossible. But upon a bill claiming to follow policies of life assurance effected by the plaintiffs' clerk with the plaintiffs' money procured by embezzlement and transferred to the defendants for valuable consideration, but with notice; Lord Chancellor Eldon allowed a demurrer, on the ground that the transaction amounted to felony by the 39 Geo. 3, c. 85, and that therefore no action could be maintained for the money; and a

(1) *Devonshire (Duke) In re*, 3 Ir. 783; *et v. Chowne v. Baylis*, 31 Beav. Eq. Rep. 412. 851.

(2) *Wickham v. Gatrill*, 2 Sm. & Giff. 353; 18 Jur. 768; 23 L. J. (Ch.) (3) *Stone v. Marsh*, 6 B. & C. 562; *v. Marsh v. Keating*, 1 Bing. N. C. 217.

principle of policy interfering; nor, for the same reason, could an account have been compelled; and secondly, that the policies could not be considered the plaintiffs' property in the hands of the defendants (1).

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SECT. 21. *Libel.*

1. The Court has no jurisdiction to stay the publication of a libel by injunction (2). And in *Gee v. Pritchard* (3) Lord Chancellor Eldon said that the publication of a libel was a crime, and that he had no jurisdiction to prevent the commission of crimes, excepting, of course, such cases as belonged to the protection of infants, where a dealing with an infant might amount to a crime, an exception arising from that peculiar jurisdiction of this Court. And whether a libel be public or private, the only method is to proceed at Law, the Court of Equity has no cognisance unless it is a contempt by being an abuse of the proceedings (4). But where in a case of libel the party injured instead of proceeding by indictment, brought an action for damages, and the defendant pleaded in justification the truth of the matters, and filed a bill for a commission to examine witnesses abroad for discovery, and for an injunction, &c.; the Court held, on demurrer, that the fact of libel being an indictable offence would not repel the right to the common defences in the civil action, and that the defendant was entitled to the ordinary means of proving the truth of his pleas, but that such bill must shew the materiality of the evidence to support the plaintiff's case at Law, and that the bill ought therefore to shew what were the pleas, or refer to them, and that it was not necessary to allege that the witnesses were residing in England at the time of the bill (5).

The Court has no jurisdiction to stay publication of a libel unless it be a contempt of the Court.

(1) *Cox v. Paxton*, 17 Ves. 329.

(2) *Clark v. Freeman*, 11 Beav. 112.

(3) 2 Sw. 413.

(4) *Anon.* 2 Atk. 469.

(5) *Macaulay v. Shackell*, 1 Bli.

(N. S.) 96; *v. Shackell v. Macaulay*,

3 L. J. (N. S.) Ch. 40.

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The Court has no jurisdiction to prevent crimes, except in protecting infants.

But the Court will restrain acts amounting to crime, if they lead to the destruction or deterioration of property.

SECT. 22. *Crimes.*

1. The Court of Chancery has no jurisdiction to prevent the commission of crimes (and the publication of a libel is a crime), except in such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime; but this exception arises from this peculiar jurisdiction of the Court (1).

2. It is well established by authority that this Court has originally no jurisdiction whatever either to enjoin or regulate the proceedings upon an indictment, but circumstances may give it; as, for instance, where the relators in an information are the persons prosecuting the indictment, the Court would have control by order personally affecting them; but Lord Chancellor Eldon was not satisfied that he had the same control over the defendants who had not come in (2). And in *Pilkington v. City of York* (3) the Court granted an injunction to stay proceedings on an indictment for trespass, two bills having been filed in Chancery by the plaintiff and defendant to try their right to the fishery in question. Though it is clear that the Court of Chancery has no jurisdiction to restrain acts which amount to the commission of a crime only and being merely criminal or illegal, yet it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or make it less valuable or comfortable for use or occupation. And where the defendants, who were officers of a trade union, gave notice to workmen by means of placards and advertisements that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs; upon a bill praying an injunction to restrain the issuing of the placards and advertisements, and alleging that by means thereof the defendants had, in fact, intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and that the value of their property was seriously injured and materially diminished; Vice-Chancellor Sir R. Malins held, upon demurrer, that the acts of the defendants, as alleged by the bill, amounted to

(1) *Gee v. Pritchard*, 2 Sw. 413.

(2) *Att.-Gen. v. Cleaver*, 18 Ves. 220.

(3) *Dick*, 84.

crime, and that the Court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of the employers' business and property (1).

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3. Chancery has no jurisdiction to restrain *quasi*-criminal proceedings on the part of the municipal authorities of a city for repeated violations of an alleged invalid ordinance (2).

SECT. 23. *Reputation—Mercantile Credit.*

1. The Court has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting of money, or of professional reputation by which property is acquired; and the publication of a notice stating that the plaintiff was a partner in a bankrupt firm was restrained. The Vice-Chancellor, Sir R. Malins, said: "What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description. But here it is distinctly sworn to, and could not be denied, that the effect of this would be seriously damaging to the plaintiff's business of a merchant. Now, the business of a merchant is about the most valuable kind of property that he can well have. Here it was the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say, if it had only injured his reputation it is within the jurisdiction of this Court to stop the publication of a libel of that description which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property" (3).

The Court has jurisdiction to restrain publication of any document tending to the destruction of property, whether in lands, goods, business, skill, or reputation.

(1) *Springhead Spinning Company v. Riley*, L. R. 6 Eq. 551; 37 L. J. (Ch.) 889; 16 W. R. 1138; 19 L. T. (N. S.) 64.

(2) *Williams v. Detroit*, 2 Mich. 560 (Amr.)

(3) *Dixon v. Holden*, L. R. 7 Eq. 488; 17 W. R. 482; 20 L. T. (N. S.) 357; *v. supra*, *Springhead Spinning Company v. Riley*, L. R. 6 Eq. 551; *Routh v. Webster*, 10 Beav. 561; *Clark v. Freeman*, 11 Beav. 112.

CHAPTER V.

CORPORATIONS—QUASI CORPORATIONS—FRIENDLY AND BENEFIT SOCIETIES.

PART I.

SECT. 1. *Municipal Corporations.*

1. In *Attorney-General v. Avon (Portreeve, &c.)* (1) the Master of the Rolls, Sir J. Romilly, held, that the Attorney-General may maintain a suit to restrain the alienation of corporate property pending the granting of a charter, and to recover the property after the charter is granted; and that the alienation of corporate property, after formal notice has been given by the Crown of its intention to grant a charter, may be impeached under the 97th section of the 5 & 6 Will. 4, c. 76. That the Court will not inquire into the validity of a charter, but will act upon it as being valid until proper proceedings are taken to set it aside; and that a charter of incorporation granted under 7 Will. 4 & 1 Vict. c. 78, to a borough previously possessing a body corporate, but not named in the schedules to 5 & 6 Will. 4, c. 76, confers upon it the same powers and privileges as if it had been so named. That the corporation established under the charter is identical with that previously existing, although the governing body may be different, and the property of the old corporation becomes vested in the new by virtue of the charter (2). However, in this case, where a corporation, from time immemorial owning freehold estates and a town hall, had not been made subject to the provisions of the 5 & 6 Will. 4, c. 76, and by the Aberavon Market Act, 1848, the corporation was empowered to construct a market and market-place, and to levy and receive rents and tolls, which were to be applied, first, in defraying the costs of obtaining the Act; secondly, in making and maintaining the buildings, and in paying off borrowed

(1) 9 Jur. (N. S.) 1117; 11 W. R. 709.

(2) *Ib.*

moneys; and, thirdly, to such objects as the corporation should think fit; and in 1860, pending an application by the inhabitants for a charter of incorporation, the corporation had sold all their property, except the town hall and the market; and early in 1861, after an intimation that the Lord President would recommend the Queen to grant the charter, they sold the town hall, and agreed to let the rents and tolls of the market to J. for fifty years at an annual rent of £5 in consideration of a fine of £600; and on the 15th of March, 1861, an original information was filed praying a declaration that the corporation was not authorized so to demise or lease the rents and tolls, and that any such demise or lease would be a breach of trust, and praying an injunction accordingly; and on the 2nd of July, 1861, a new charter had been granted to the inhabitants; and on the 6th of February, 1862, the information was amended by making the mayor, aldermen, and burgesses, under the new charter, defendants, and praying a declaration that the market, market-place, &c., and the lands belonging thereto, and all rights to levy rents and tolls, and all other the property and rights of the corporation, had become vested in the new corporation, and that the old corporation might be decreed to deliver up possession, and that inquiries and accounts might be directed to ascertain what property belonged to the old corporation at the date of the new charter; and the corporation insisted that there was no trust for the benefit of the inhabitants; the Lords Justices having come to the conclusion that this was so, except as to the property under the Aberavon Market Act, discharged a decree of the Master of the Rolls in conformity with the prayer of the amended information, and held that no relief to enforce rights arising under the new charter could be given upon an information filed before the grant of that charter, and that the only decree that could be made upon the information was to restrain leases of the market property upon fine (1).

2. The Lords Justices, in *Galloway v. City of London* (2), held, that if the discretion which a corporation is bound to exercise as a public body is fettered by any agreement with a third party, the Court will restrain it from exercising its compulsory powers of

(1) *Att.-Gen. v. Avon* (otherwise *Aberavon, Portreeve, &c.*), 33 L. J. (Ch.) 172.

(2) 10 Jur. (N. S.) 552; 12 W. R. 891; 10 L. T. (N. S.) 439.

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Though persons having special statutory powers cannot exercise them for collateral purposes, it is different with an existing public body entrusted with the duty of making public improvements.

Town council
restrained
(here)

taking lands from another party; such powers in a corporation to enable them so to acquire land must be exercised *bonâ fide* for the purposes for which the powers were conferred, and not for ulterior purposes. And where the Corporation of London was, by statute, empowered to construct a market within the City, to lay out a new street as an approach thereto, to purchase property compulsorily for these purposes, to grant leases of property taken, and if any purchased property was not required to appropriate the same by sale or otherwise as the corporation might think fit; and it was likewise provided, that the rents reserved by the leases should be applied for keeping up the market; and the plaintiff was seised of property which the corporation was authorized to take, but of which only a small portion was required for the purposes of the statute; and the corporation gave him notice that they required all his land, their object being to dispose of the portion not required to a railway company in accordance with an agreement made with the company before the passing of the statute under which they proposed to take; the Lords Justices, reversing a decision of Vice-Chancellor Sir W. P. Wood, upon the grounds above stated, restrained the corporation from exercising their compulsory powers against the plaintiff. But the House of Lords (1) reversed this decision of the Lords Justices, and held that the plaintiff Galloway was not entitled to the injunction, on the ground that although where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind, and that, therefore, a company authorized (making due compensation) to take compulsorily the lands of any person for a definite object may be restrained by injunction from any attempt to take them for another object, yet the case is different where an existing public body, such as the corporation of a city, is intrusted by the Legislature with the duty of making public improvements in its city; the powers thus intrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction (2).

3. Where a town council (being also the local board of health)

(1) L. R. 1 H. L. 34.

(2) *Sed v. Spokes v. Banbury Board of Health*, 35 L. J. 105.

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of a borough appointed, under powers contained in their local Act, a "building and improvement committee," whose duty it was to execute the powers delegated to them by the town council under sect. 34 of 21 & 22 Vict. c. 98 (the Local Government Act, 1858); and the plaintiff, having an intention of pulling down his manufactory in a street of the borough, and of erecting a new one, sent a plan of the proposed new building to the surveyor of the town council, who returned it with the written approval of the committee, accompanied by a printed common-form note, stating that the approval of any plan by the committee referred only to such matters as were required to be set forth therein in accordance with certain by-laws (which had been made under the above-named statute), and that it gave no authority for making any projection on the front of any building into any street beyond the proper line of it; and the plaintiff having, after receiving such approval, pulled down his manufactory, received a notice from the town council, acting under sect. 35 of the same statute, that any building thereafter to be erected must be built on the line marked "red" in the plan thereto annexed, which line was about thirteen feet behind the mark on the plan approved by the committee; and the plaintiff having thereupon filed a bill to restrain the town council from acting upon their notice, Vice-Chancellor Sir J. Stuart held, that the town council were not at liberty to give any such notice after the approval by their committee; and an injunction was granted, and afterwards made perpetual, to restrain the town council from interfering in any way with the erection of the building in accordance with the plan approved (1). Sect. 34 of the 21 & 22 Vict. c. 98, empowers a town council, being a local board, to make a by-law requiring to be given to them a notice, plan, &c., of a new building; and the 35th section applies only to buildings that have been taken down "without any previous approval of a plan, &c., for their re-erection," &c. (2).

4. Where the defendants were empowered under their Acts to alter a footway, but the plaintiffs had sustained, and would sustain, injury thereby, Vice-Chancellor Sir J. Stuart refused to restrain the defendants from raising a footway, under powers contained in

(1) *Slee v. Bradford (Mayor, &c.)*, 4 Giff. 262; 9 Jur. (N. S.) 815.

(2) 1b.

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local Acts (which incorporated the Lands Clauses Act), in front of the plaintiffs' house, and thereby preventing access to a warehouse, and from otherwise damaging their property; but it was referred to Chambers to ascertain and certify the amount of injury, and what would be a proper sum to be awarded by way of damages in respect of such injury (1).

Where the Crown has been in possession for more than 160 years, and a corporation has not asserted its legal rights under charters, the parties will be left to their legal remedies.

5. Where the Crown has been in possession of lands for more than 160 years, and a corporation, who originally claimed under various charters granted by the Crown, and particularly charters of Edward VI., and Henry VIII., and Charles II., refrains from asserting their legal rights, having had no opportunities of doing so during such period, the Court will not interfere in Equity, but remit the parties to their legal remedies (2).

A suit against a corporation to enforce public trusts must be filed by the Attorney-General, and not an individual member—and a burgess has no individual claim for compensation out of purchase-moneys of lands in which he claimed right of pasturage.

6. Where a burgess filed a bill against a corporation not within the Municipal Corporation Act (5 & 6 Will. 4, c. 76); and their solicitor, alleging that they were trustees of estates for themselves, the town, and the inhabitants, and that he, as a senior burgess, was individually entitled to rights in the lands, most of which had been sold, and praying that the corporation might be restrained from selling what remained of the estates, and for a discovery relating to the mortgaged estates, and for accounts; the Master of the Rolls, Sir J. Romilly, held, on demurrer, that if the plaintiff had any right he was entitled to it in his corporate, and not in his individual, capacity (3); and that a suit against a corporation to enforce public trusts must be filed by the Attorney-General, and not by an individual member, though he allege himself entitled to a separate benefit; and that if a burgess claims an individual right of pasturage in a part of the corporate estates, it must be considered as made in his corporate, and not in his individual capacity; and where the particular lands had been sold, the Court held, that no distinct claim could be made by the burgess individually for compensation out of the unsold property of the corporation (4).

(1) *Wedmore v. Bristol (Mayor, &c.)*, 7 L. T. (N. S.) 459. *tion) v. Att.-Gen.*, 5 L. T. (N. S.) 427.

(3) *Evan v. Corporation of A...*

(2) *Kingston-upon-Hull (Corpora-* 29 Beav. 144; 30 L. J. (Ch.) 165.

(4) *Ib.*

7. A corporation, being lords of a market and owners of the soil, is entitled at Common Law to change the site of a market held in a borough; but where the corporation, acting as a local board rather than in their corporate capacity, takes steps under the Local Government Act, 1858 (21 & 22 Vict. c. 98), to set up a market in a new place, it can only act under the powers and subject to the provisions of that statute, and is not entitled to fall back on its Common Law right (1). But upon a bill by occupiers of houses in the street where the market had been immemorially held, to restrain a proposed removal of such market on the ground of interference with their rights of stallage, Vice-Chancellor Sir W. P. Wood held, that the Court would require the right of stallage to be decided at Law before granting an injunction to restrain a corporation from interfering with such rights of stallage where the right has not been admitted by the corporation (2); and the Court said it was a strong *prima facie* case to be tried, whether the defendants were not "establishing" a new market under sect. 50 of that statute, by setting up a new market at a short distance from and in lieu of an ancient market, and not a mere removal (3).

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A corporation lords of a market and soil can, at Common Law, change the site, but if acting as a local board under the Local Government Act, 1858, it can only act under the powers of that Act.

8. Where, by an Act of Parliament, a corporation was directed to cause a piece of land to be drained and levelled, and kept in a proper condition, for the purpose of public recreation, the Court restrained the corporation by injunction from permitting a cattle fair to be held on such piece of land (4).

Corporation restrained permitting a cattle fair on land directed by an Act to be kept for recreation.

9. The 95th section of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), which enables municipal corporations to renew leases on a fine in cases where sanctioned "by ancient usage or by custom or practice," at "a fine certain," or where they "have ordinarily made renewal" upon "an arbitrary fine," is to be construed liberally; but the word "renewal" in this Act does not mean a mere custom to let on lease at different rents; and though the renewals need not be on precisely the same terms, there must be such a uniformity as to shew that the same lease has been renewed. And where leases were granted by a municipal corporation of the same property in 1778, 1798, and 1824, to the same lessee and his

(1) *Ellis v. Corporation of Bridg-*
north, 2 J. & H. 67; 9 W. R. 331.

(3) *Ib.*

(2) *Ib.*

(4) *Att.-Gen. v. Southampton (Mayor,*
&c.), 2 Giff. 363.

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assigns, for twenty-one years, at a rent of 5s.; and in the last two instances alone a fine of 7s. 6d. had been taken, and the covenants varied; and there was an interval of six years between the second and third, during which there was a yearly tenancy; the Master of the Rolls, Sir J. Romilly, held, that the case did not come within the 95th section of the Municipal Corporations Act, and that a renewal could not be granted at an under value, and on a fine; and he said that, in his opinion, there had neither been a uniform practice of renewal in this case, in any sense of the term, within the proper construction of this clause; nor had the leases been uniform in their character (1).

On an interlocutory motion for an injunction as to a matter merely pecuniary, plaintiff must satisfy Court there is some probability of the bill not being dismissed.

10. On an interlocutory motion for an injunction as to a matter merely pecuniary, the plaintiff cannot succeed without satisfying the Court, not merely that there is a case to be tried, but that there is some probability of the bill not being dismissed at the hearing; and an information to restrain a municipal corporation from applying the borough fund, or raising a rate for the purpose of opposing a bill in Parliament, the object of which was to interfere with the sewage and drainage of the town, was held by the Lords Justices not a suit in which success was sufficiently probable to entitle the relator to an interlocutory injunction (2). In this case, upon an intended application by a municipal corporation of part of the surplus borough fund arising from their borough rates in payment of the costs of a partially successful opposition to the passing through Parliament of a bill for the construction of waterworks, containing powers so to interfere with the stream of a river passing through the borough town as to prevent its efficient action in the removal of the sewage of the town, and thereby indirectly affecting the value of the rateable houses in the borough, the tolls of the market, and other property constituting the borough fund, it was held not to be so clearly contrary to the spirit of the clauses of the Municipal Corporations Act (5 & 6 Will. 4, c. 76)—which provides for the application of such surplus fund—as to form the ground of an interlocutory injunction by the Court of Chancery restraining such application (3).

(1) *Att.-Gen. v. Corporation of Great Yarmouth*, 21 Beav. 625.

5 De G. M. & G. 52; 18 Jur. 299;
23 L. J. (Ch.) 429.

(2) *Att.-Gen. v. Wigan (Mayor of)*,

(3) *Ib.*

11. The corporation of L. had, from time immemorial, exercised the functions of superintending the measuring and unloading oysters at the market of L. This they did by their officers, "the yeomen of the waterside," who appointed eighteen "deputy day oyster meters," who by custom were entitled to the monopoly of this employment. There was no immemorial fee; but in 1760 8s. per twenty bushels for the first 100 bushels, and 4s. per twenty bushels for all additional quantities loaded, were, on a trial for *quantum meruit*, found by the jury to be reasonable charges. In addition to this, purchasers of oysters usually paid to the holdsmen, or persons actually performing the work, a gratuity of 1d. per peck. The offices were saleable; but if a deputy day oyster meter died without having sold his office, it reverted to the corporation of L. Between 1836 and 1850 two offices thus fell vacant, and were kept by the corporation in their own hands, they conforming to the usages of the body of the deputy day oyster meters. Those usages were mainly such as directed the rotation of employment, and the throwing all payments (except the 1d. per peck which went to the holdsmen) into a common stock, which was equally divided amongst them. The corporation of L., wishing to put an end to this monopoly, appointed two of the common holdsmen to the two offices then in abeyance upon the express agreement that they would renounce the payment of 1d. per peck, and disregard the rota, and not put their earnings into the common fund, but retain every man his own. On a bill filed by the other sixteen deputy day oyster meters to restrain these two new members of their body from working except upon the same terms as all the rest, and from disregarding the by-laws and regulations of the body of deputy day oyster meters, Vice-Chancellor Sir G. J. Turner held, first, that it was necessary for the plaintiffs to make out the immemorial existence of the body of which they formed part, otherwise they would have stood in no better position than deputies appointed by persons who were themselves deputies; and that a body of the description answered by the deputy oyster meters, although describing themselves as servants of the corporation, may have the power of making by-laws to regulate the rights and duties of its members; and whether they are to be deemed to have the power or not depends upon usage, in the absence of express pro-

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vision that the corporation, although it had sole power to appoint to the office of deputy day oyster meters, had no power to appoint to the office on terms differing from the general regulations of the body; and, *semble*, that there is no case where the Court has charged a person for wilful default in not having received that which he had no legal right to recover; and, *per* Vice-Chancellor Sir W. P. Wood, that a payment which cannot be legally demanded, and which is even in itself improper, may yet be so legalised by custom as that one of several interested parties is not justified in refusing it when proffered (1).

The borough fund is a trust fund, and a corporation was restrained applying the fund (which had been mixed with other funds) in paying expenses of an application for an Act for improving a river.

12. The borough fund is a trust fund, and is so constituted by the Municipal Corporations Act (5 & 6 Will. 4, c. 76) (2); and the 192nd section of this statute enables the surplus of the borough fund to be applied for the public benefit of the inhabitants and improvement of the borough. In this case, by an Act subsequently passed, the corporation of the city of N. were authorized to levy certain tonnage dues, to be applied in a specified manner, and, after they were satisfied, the remainder to be applied to certain purposes, some of which were the same as those to which the surplus of the borough fund was made applicable; and distinct accounts were directed to be kept of the tonnage dues and borough fund, but the treasurer mixed the two funds at his bankers; and the corporation proposed to obtain an Act of Parliament for improving a river flowing through the city, and applied money from the funds at the bankers in paying certain expenses; and an information was filed by the Attorney-General, at the relation of the ratepayers, praying an injunction to restrain this application to Parliament at the expense of the borough fund, and the same was granted; and, on appeal from that decision, the appeal motion was refused with costs (3).

13. Where a corporation, having, under an Act of Parliament, a right to take land for the purpose of certain public works, had given notice to the owner of the inheritance of an intention to take it, and they then entered regularly upon the land for the purpose

(1) *Thompson v. Daniel*, 17 Jur. 773; 22 L. J. (Ch.) 507.

(2) *Att.-Gen. v. Corporation of Norwich*, 16 Sim. 275; 21 L. J. (N.S.)

(Ch.) 139; *et v. Att.-Gen. v. Corporation of Lichfield*, 11 Beav. 120, *post*, p. 728, pl. 15.

(3) *Ib.*

of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons and rails and other implements on the lands, and there left them, but did not commence the works or do any damage; and this was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December; and in the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the waggons, &c., to remain on the land, and from taking possession of the land until they had complied with the provisions of the Lands Clauses Consolidation Act; Vice-Chancellor Sir R. T. Kindersley held, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the Act; that the corporation had not authorized any taking possession of the land, and that the contractors had obtained the permission of the tenants to leave the things in question on the land, and that it was not a case for filing a bill at all, and a motion for an injunction was refused with costs (1).

14. Where a corporation was empowered by special Acts, which embodied the Lands Clauses Consolidation Act, to construct waterworks, and to take certain lands belonging to A. and B., the boundary between which was improperly described in their plans and books of reference; and in consideration of B.'s withdrawing his opposition to their bill in committee, they agreed to settle the value of the land required from, and the compensation due to him, by arbitration under the above Act, and to fix the exact quantity of land within six months after the passing of the bill; and in the proceedings under the reference to arbitration the mistake of the boundary was pointed out; but the award fixed a value, in terms only, for the land within the boundary so inaccurately delineated, and the corporation took that land accordingly, leaving between it and the true boundary line a narrow strip of land belonging to B., but which the corporation had agreed to purchase from A. as part of his land, and for which they paid a sum of money to A., and of which they took possession as part of the land purchased from A.; and B. recovered the strip of land afterwards from the corporation

(1) *Standish v. Mayor of Liverpool*, 1 Drew. 1.

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Sect. 124 of the Lands Clauses Act, 1845, applies to land altogether omitted to be purchased by mistake.

It is the duty of a municipal corporation to provide as far as practicable for the expenses out of the income of the year.

This Court has jurisdiction to compel parties to account for sums received as the borough fund.

in ejectment, and a rule for a new trial was refused; and the corporation thereupon proceeded, within six months after such refusal, to make themselves legal owners of the strip of land in question, under the compulsory powers given in case of mistake by the 124th section of the Lands Clauses Act, 1845; and B. then filed a bill for an injunction to restrain them from so doing. Upon motion, the injunction was refused with costs, the Court holding that the circumstances amounted to mistake within the meaning of the said 124th section, and that that section applied to land altogether omitted to be purchased by mistake, as well as to an outstanding interest therein so omitted to be purchased (1).

15. Upon a true construction of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, it is the duty of a municipal corporation to provide, as far as it is practicable, for the expenses of each year out of the income of that year, and it ought not to contract debts to be paid in future years, for the purpose of avoiding, in the current year, to provide for the expenses then incurred; but this rule will not be so strictly applied as to prevent, under all circumstances, the payment of a prior debt out of the moneys raised by a subsequent rate. And where an information was filed, stating that a municipal corporation having considerable corporate property, but having incurred debts which their income was not sufficient to discharge, were endeavouring to raise money for the payment of their debts by means of a rate, and an application was made for an injunction to restrain the corporation and its officers from the application by them of the money already collected by a borough-rate for costs, debts, or expenses incurred prior to the making of the rate; and from taking any steps to enforce payment of sums not yet received under the rate, and from making any new or additional rate for the purposes of paying thereout any expenses incurred prior to the making of the rate, the Court, under the circumstances, refused the injunction (2). But the borough fund created under the Municipal Corporations Act (5 & 6 Will. 4, c. 76) is a trust fund, and this Court has authority and jurisdiction to compel the parties who receive and apply the fund to account for

(1) *Hyde v. Corporation of Manchester*, 16 Jur. 180. *field*, 11 Beav. 120; 17 L. J. (N.S.) (Ch.) 472; *v. Att.-Gen. v. Daniell*, 9

(2) *Att.-Gen. v. Corporation of Lich-* L. J. (N.S.) (Ch.) 394, *post*.

the sums they receive, and the application of them (1). However it is not clear that the Act ought to be so strictly construed as to lead to the conclusion that an expense not included in a prior estimate, and so incurred as to constitute what may be justly called a debt, before a subsequent estimate or rate is made, can in no case whatever be lawfully provided for by such subsequent estimate or rate. But in a case requiring its exercise, the Court may have jurisdiction to restrain the corporation from making any new or additional borough rate for the purpose of paying thereout any expenses incurred previously to making the same; and the Court has jurisdiction, if it be expedient, and the case should require it, to restrain the application of money collected by rates, for costs, debts, and expenses incurred prior to making the rate (2). And in *Attorney-General v. Mayor, &c., of Liverpool* (3) the Court held, that it had authority under its general jurisdiction to interfere for the protection of property vested in the corporation of a borough named in the 6 Will. 4, c. 76, on the ground of a breach of trust committed or threatened after passing of that Act, although the time when the existing members of the governing body corporate of such borough were to go out of office may not have arrived. And in *Parr v. Attorney-General* (4) it was held, that the Court of Chancery has jurisdiction to prevent the town council of a borough from abusing the power given to them by the Act 5 & 6 Will. 4, c. 76, of awarding compensation for the enrolments of offices, and that no difference in this respect is made by the circumstance that the compensation is about to be raised by means of a rate. But a Court of Equity ought not to interfere in the ordinary management of the borough fund (5). And in *Attorney-General v. Birmingham Corporation* (6) a demurrer was allowed by Vice-Chancellor Sir W. P. Wood to an information, at the relation of the guardians of the poor of the parish of Birmingham and two ratepayers of the

The Court has jurisdiction to restrain application of money collected by rates for debts, &c., incurred prior to making the rate.

But should not interfere in the ordinary management of the borough fund.

(1) *Att.-Gen. v. Corporation of Lichfield*, 11 Beav. 120; *et v. Att.-Gen. v. Corporation of Norwich*, 21 L. J. (N. S.) (Ch.) 139; *ante*, p. 726, pl. 12; *Att.-Gen. v. Aspinall*, 2 My. & Cr. 613; reversing 1 Keen, 513.

(2) *Ib.*

(3) 1 My. & Cr. 171.

(4) 8 Cl. & F. 409; affirming *Att.-Gen. v. Corporation of Poole*, 4 My. & Cr. 17, which reversed S. C., 2 Keen, 190.

(5) *Att.-Gen. v. Corporation of Norwich*, 1 Keen, 700; 2 My. & Cr. 406.

(6) L. R. 3 Eq. 552.

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borough, against the mayor, aldermen, &c., of the borough, and the town clerk, praying for a declaration that, according to the true intent and meaning of the Birmingham Improvement Acts, a sum of £2700, agreed by the council of the borough to be paid for the purchase of eighty-five square yards of land in Bull Street, Birmingham, for the improvement of the street, was payable out of and chargeable upon the street improvement rate, and not out of the borough rate or borough funds; and that the said sum could not lawfully be raised upon the security of a mortgage of the borough rate or the borough funds, and for an injunction accordingly. In this case the corporation of Birmingham, having contracted for the purchase of land for the widening of a street (not comprised in the works specified in the local Acts of 1851 and 1861), and having (after due notice given, and after all parties interested in the scheme had been heard before a Commissioner deputed by the Treasury), obtained the sanction of the Treasury to the purchase of the land, and the charging of the borough fund with the purchase-money; the Vice-Chancellor held, upon the construction of the statutes, that the corporation were lawfully empowered to raise the purchase-money out of the borough fund.

16. A judgment obtained by confession against an old corporation, subsequently to the 16th of February, 1836, is not conclusive against the new corporation; and in a case where the Court was doubtful whether the demand upon which the judgment was obtained was within the terms of the 6 & 7 Will. 4, c. 100, it was held, upon an information filed by two of the burgesses of the new corporation, to stay the issuing of execution against the goods of the corporation upon that judgment, that they were entitled to have an issue to try whether or not it was originally such a demand as came within the provisions of that Act (1).

Equity will not interfere with the exercise of a discretionary power by a corporation unless fraud.

17. Where a corporation have the power of doing or not doing an act at their discretion, Equity will not interfere with the lawful exercise of the discretion, however injurious its consequences, unless it infer fraud (2). But an injunction will issue to restrain a city from taking private property without legal right (3). So,

(1) *Att.-Gen. v. Corporation of Dublin*, 1 D. & War. 545.

(2) *Semmes v. Columbus*, 19 Geo. 471 (Amr.)

(3) *Lumsden v. Milwaukee*, 8 Wis. 485 (Amr.)

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if the power of taxation in a municipal corporation is so limited as not to be adequate to pay, within any reasonable time, the damages caused by the opening of a public street, a Court of Equity will prohibit such opening by injunction, until security for payment be given (1). An injunction to restrain an appropriation of public property to private purposes will not be dissolved upon the coming in of the answer, admitting the acts charged, but denying that the public interest will be thereby prejudiced (2). Where the city of New London (U. S.) appropriated money for the celebration of the anniversary of independence, a bill was sustained on behalf of certain taxpayers to restrain the payment of such appropriation; the Court remarked: "The city corporation was in the nature of a trustee of the money in its treasury for the corporators, the inhabitants of the city, for the purposes for which they were incorporated, and here was a meditated misappropriation of the trust fund; and, secondly, it is extremely doubtful whether the plaintiffs could have any other remedy. The amount appropriated by this vote was in the city treasury, and, if abstracted, must, when wanted for other and legitimate purposes, be supplied by a tax on the inhabitants; it is suggested that the plaintiffs should bring an action against the city for a misappropriation of its funds, or that, when such a tax is laid, they should by a proper action, resist its collection. We are by no means prepared to say that an action could be maintained on either of these grounds, and are strongly inclined to think it could not; but however this may be, we are clearly of opinion that the plaintiffs are not bound to wait until the money is mispent, nor until such tax shall be levied and attempted to be collected, but that they may call on a Court of Equity to interpose by way of preventing the injury" (3).

Misappropriation of public property will be restrained.

Misappropriation of the funds of a city corporation will be restrained.

18. Where an injunction issues against a city and all its members, officers, and agents, restraining them from making a certain grant, a member of the city council, who votes for the grant, violates the injunction, though the resolve, in favour of the grant, is conditioned on the grantee's acceptance of its terms (4).

(1) *Keene v. Bristol*, 26 Penn. 46 (Amr.)

(2) *Att., &c. v. Cohoes Co.* 6 Paige, 133 (Amr.)

(3) *New London v. Brainard*, 22 Conn. 552-6 (Amr.)

(4) *People v. Sturtevant*, 5 Seld. 263.

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The College of Physicians has power to grant licenses without restrictions as to compounding and supplying medicines.

There is nothing to prevent a physician making a special contract for his services.

SECT. 2. *Corporations Aggregate.*

1. Under the Medical Act, 1858 (21 & 22 Vict. c. 90), and prior statutes, the Royal College of Physicians has power to grant licenses without restricting its licentiates from compounding and supplying for gain the medicines which the licentiates prescribe, and for such licentiates so to compound and supply medicines is not an invasion of the privileges of the Apothecaries Company. But if such practice by licentiates of the college were an invasion of the privileges of the Apothecaries Company, the proper remedy would be by proceedings at Law against the offender, and not by information and bill in Equity against the college; and on an information and bill by the Attorney-General and Apothecaries Company to restrain the College of Physicians from granting such licenses, a demurrer for want of equity was allowed (1); and the rule that a physician shall not maintain an action for his charges is founded on the general custom of the profession not to charge, but there is nothing to prevent him from making a special contract that he shall be paid for his services, and recovering under the contract (2).

2. The powers conferred on the Metropolitan Board of Works by sect. 135 of the Metropolitan Local Management Act (18 & 19 Vict. c. 120) are not controlled by the 150-153rd sections, and the board is empowered under the former section to make such sewers as they shall think fit, on compensating the owners of property for the damage occasioned thereby, without being required under the latter sections (which give them an option if they deem it necessary) to buy the land under which they carry their works, or easements therein, from the owner (3). And in *North London Railway Company v. Metropolitan Board of Works*, *Winter v. Same* (4), Vice-Chancellor Sir W. P. Wood, held, that under the Local Management Act, 1855, 18 & 19 Vict. c. 120, the Metropolitan Board may execute any works comprised within the terms of sect. 135, making compensation for damages, without purchasing

(1) *Att.-Gen. v. Royal College of Physicians*, 1 J. & H. 561; 30 L. J. (Ch.) 757. (3) *Hughes v. Metropolitan Board of Works*, 7 Jur. (N.S.) 986; 9 W. R. 517.

(2) lb.

(4) 1 Joh. 405.

the lands or any easement in them, under the provisions of sects. 150, 151, 152, and 153, and of the Lands Clauses Act, 8 Vict. c. 18, notwithstanding that the works may be of such a character as to involve an actual taking of land, and may be within the powers of sects. 150 and 153; and the 150th, 151st, and 152nd sections, enabling them to purchase any lands, or any right or easement in or over any land, which they may deem necessary or expedient for the formation or protection of their works, are not to be read as restricting such exercise of those powers.

3. Where there is a doubt whether the arbitrary powers given to local boards are properly exercised, it is the duty of the Court to take care that the checks appointed by the Legislature have due operation in favour of the persons affected; and the Court restrained a local board of works which had exceeded their statutory powers, and had attempted to exercise arbitrary powers without leaving to a person affected thereby the right of appeal given by the Act, from so doing until the question should be determined by the proper tribunal (1). And the Court held, that the 211th section of the Metropolitan Local Management Act, giving an appeal from the order of the district board to the Metropolitan Board of Works would not be considered as imperative, or as superseding the enactments in the Nuisances Prevention Act which give jurisdiction to the justices of peace in cases where a nuisance is ascertained to exist by the local authorities; and in this case the Court held that a metropolitan district board of works has not authority under the Metropolitan Local Management Act, 1855 (18 & 19 Vict. c. 120) and the Nuisances Removal and Diseases Prevention Act, 1855, to lay down any general or arbitrary rule requiring owners or occupiers of houses situate within its district to convert privies into water-closets; and a district board of works, in exercising the jurisdiction with which it is invested under that Act, must have regard to the circumstances of each particular case. And where a district board of works, acting under 18 & 19 Vict. c. 120, had made an *ex parte* order on the plaintiff to turn into water-closets the privies attached to cottages belonging to him, and on his failing to do so they pro-

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Where there is a doubt whether the arbitrary powers given to a local board are properly exercised, the Court will see that the checks appointed by the Legislature have due operation.

(1) *Tinkler v. Wandsworth District Board of Works*, 1 Giff. 412; 2 De G. & J. 261; 3 Jur. (N. S.) 1292; 4 Jur. (N. S.) 293.

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ceeded to enter upon the premises for the purpose of doing it themselves, and the order appeared to have been made, not with regard to the state of this particular property, but in consequence of a previous determination to substitute water-closets for privies throughout the district; the Court held, that the board was exceeding its statutory powers, and ought to be restrained from entering on the plaintiff's property for the purpose of making the alteration; and, assuming that the Act authorizes a board to require such an alteration as the above in particular cases, still the board is bound to exercise its discretion in each particular case, and is acting *ultra vires* if without exercising such discretion it proceeds to make the alteration in pursuance of a determination to require it to be made in all cases: *per* Lord Justice Turner (1).

4. Where the plaintiff, being owner of land in a parish, and wishing to build thereon, had, from a misapprehension of his duties under the Metropolitan Local Management Act (18 & 19 Vict. c. 120), constructed a sewer in the main sewer at his own expense, and afterwards, wishing to build another street in a parallel direction to the former, had written to the vestry, asking how they required the proposed new houses to be drained, and the vestry required him to continue the former sewer; to which he had replied, that under the Act it was not incumbent on him to construct the sewer, but only to make drains from the houses into the sewer; and the vestry, however, gave him notice to discontinue the erection of the houses, adding, that they had power to cause the same to be demolished; upon a bill filed to restrain the vestry from demolishing, destroying, altering, or injuring the houses, or interfering with, or preventing the completion of them, Vice-Chancellor Sir J. Stuart granted an interim order for an injunction, which, on motion by consent for a decree, was made perpetual, and the costs of the suit were ordered to be paid by the vestry (2).

5. Upon a bill by the owners of certain lands against a local board of health to restrain the defendants from constructing any sewer beyond their district, and through lands belonging to the plaintiff; Vice-Chancellor Sir R. T. Kindersley held, that the

(1) *Tinkler v. Wandsworth District Board of Works*, 1 Giff. 412; 2 De G. (N. S.) 293.

(2) *Clarke v. Paddington Vestry*.
Board of Works, 1 Giff. 412; 2 De G. 5 Jur. (N. S.) 138.
& J. 261; 3 Jur. (N. S.) 1292; 4 Jur.

powers of local boards, under the Public Health Act, 11 & 12 Vict. c. 63, s. 43, for the construction of sewers are confined to their own district, and that the Local Government Act, 21 & 22 Vict. c. 98, extends the exercise of those powers beyond the district only where it may be necessary for the purpose of outfall or distribution of sewage, and not merely for convenience, or for the purpose of making new sewers, and granted the injunction (1). But a local board of health has no power, under the Public Health Act, 11 & 12 Vict. c. 63, to enter upon land without the consent of the owner for the purpose of making reservoirs and deposit beds for retaining the sewage; and Vice-Chancellor Sir R. T. Kindersley granted an injunction to restrain such a proceeding (2). And public works ordered by Act of Parliament must be so executed as not to interfere with the private rights of individuals; and in deciding on the right of a single proprietor to an injunction to restrain such interference the circumstance that a vast population will be injured (*e.g.*, by remaining undrained) unless his rights are invaded, is one which the Court cannot take into consideration (3). And where the council of a borough was bound by a local Act of Parliament, incorporating the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), effectually to drain the town; Vice-Chancellor Sir W. P. Wood held, that they were not justified in so carrying on their operations for this purpose as to drive away fish, and prevent cattle from drinking of the water of a river at a part seven miles below the town, and where it belonged to the plaintiff; and that, assuming the inhabitants of the borough to have had before their Act a right to drain their houses into a river, that circumstance would not authorize the council discharging the sewage in such manner as to subject the plaintiff to the inconvenience of which he now complained; and although the plaintiff had submitted to the injury for nearly four years, trusting to the assurance of the council that they were carrying out a scheme of sewage by which eventually the evil would be removed, the Court held that he was not precluded on the ground of laches from applying for an injunction, the rule in such cases being that the mere prospect of

Public works ordered by an Act must be so executed as not to interfere with private rights.

In deciding the right of a single proprietor to an injunction, injury to a vast population unless his rights are invaded, cannot be considered.

Drainage of town, so as to drive away fish and prevent cattle drinking (here) restrained.

No laches (here) by submitting nearly four years trusting to an assurance the evil would be removed.

(1) *Hayward v. Lowndes*, 28 L. J. (Ch.) 400; 4 Drew. 454. (2) *Sutton v. Norwich (Mayor, &c.)*, 27 L. J. (Ch.) 739.

(3) *Att.-Gen. v. Birmingham (Borough Council)*, 4 K. & J. 528.

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The rule in such cases is, that the mere prospect of injury gives no right to relief.

injury does not give a right to this relief (1). A local board of health is not justified in polluting the surface water which flows by an open gutter into a canal by diverting it into a sewer, and passing the sewage into it (2). But where a canal company had a statutory power to supply their canal with water out of such brooks, streams, and watercourses as should be found within a certain distance; the Master of the Rolls, Sir J. Romilly, held, that it would be difficult to hold that the mere surface water of a road, not arising from any spring or natural certain supply, could fall within the Act so far and to such an extent as to exclude a local board of health from making a system of drainage essential to the district which, offending against the rights of no one in any other particular, merely allowed to flow through, from rain, and from the overflowing of the surplus of the neighbouring houses, water which had theretofore flowed down an open gutter into a canal; but the Court granted an injunction to restrain the board from opening communications between the side sewers, which drained the neighbouring houses, and the main sewer, so long as the main sewer ran into and polluted the canal, without first obtaining the consent of the company (3). But where the Metropolitan Board of Works had constructed a sewer on the high road, and the Lewisham district board had made a branch sewer running into it, and the combined effect of the two was to drain an ornamental pond and rivulet on the adjoining lands of the plaintiff; the Master of the Rolls, Sir J. Romilly, held, that neither of the boards was, in respect to the diversion of the water, to be treated as clothed with the rights or obligations of adjoining landowners, and that they had not exceeded their statutory right so as to be liable to be restrained by injunction; but that if either of the boards was producing injury to the plaintiff by the unskilful or improper construction of the sewer, the Court would interfere to prevent it, however that such not being the case, this Court would not restrain the defendants in the execution of the works, or compel them to make the sewer water-tight, or to do any act to

(1) *Att.-Gen. v. Birmingham colnshire Railw. Co. v. Workop (Borough Council)*, 4 K. & J. 528. (Board of Health) 23 Beav. 196; 3 Jur.

(2) *Manchester, Sheffield, and Lin-* (N. S.) 304.

(3) *Ib.*

restore the ancient flow of water, and the plaintiff was without any rights in Equity, and his rights were limited to a claim for compensation for the damage done under the 11 & 12 Vict. c. 112, s. 50 (Metropolis Sewers), and the 18 & 19 Vict. c. 120, s. 86 (the Metropolitan Management Act) (1); but, *semble*, it would have been otherwise if, without impairing the efficiency of the drainage, and at a slight expense, the sewer could have been so constructed as not to interfere with the stream. The Master of the Rolls said that if he were satisfied on the evidence that the drain was not properly constructed, or even that by a very slight expense as good a system of drainage might be sustained and kept up by the defendants consistently with preserving to the plaintiffs the accustomed flow of their rivulet, he should not hesitate to enforce that mode of construction. But though the owner of land is by law entitled to deal with it in every possible manner he pleases, provided he does not thereby injure another person, if, in so dealing with his own land, he injures another, and commits a nuisance on the adjoining property, this Court will interfere, and prevent his exercising the right which he is, *prima facie*, by law entitled to, and from dealing with his own property to the injury of the property of his neighbour; yet in such cases the burden of proof lies on the owner of adjoining land to establish, to the satisfaction of the Court, the injury inflicted by the person in so dealing with his own land. However, persons interfering with the property of individuals by virtue of an Act of Parliament are strictly tied down to the limits of the powers given by the Act, and they are bound to shew clearly and distinctly that they are empowered by the Act to do what they propose to do. And where, under the 45th, 46th, and 145th sections of the Public Health Act, 1848 (11 & 12 Vict. c. 63), providing that the local boards may make necessary sewers through or under any lands whatever, and cause them to be emptied into such places as may be fit and necessary, provided that nothing in the Act shall authorize the boards to use, injure, or interfere with any water-course, stream, river, &c., in which the owner of any lands may be interested without the consent of such owner; the Lords Justices held, that persons having a right to watering-places in a river

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Persons interfering with property of individuals by virtue of an Act are strictly tied down to the limits of the powers given them.

(1) *Stainton v. Woolrych*, 23 Beav. 225; 3 Jur. (N. S.) 257; 26 L. J. (Ch.) 300.

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A public body exceeding its powers will be restrained.

adjoining lands for the use of their cattle, but not being owners of the water or of the bed of the river, are interested in the river within the meaning of the proviso, but would not be able to maintain an action for an interference with their rights unless they were injured by such interference, and that works of a local board of health producing an outfall of the sewage of a town above such a watering-place was such an interference as to cause injury to the landowners; but, affirming the decision of the Master of the Rolls, Sir J. Romilly; that, whether this was established or not, it ought (if not consented to by them) to be restrained by injunction, being the act of a public body exceeding its powers (1). And *per* Cresswell and Williams, JJ. (*dubitante* Turner, L.J.), that a right of fishing is within the term "land," according to the interpretation clause of the Public Health Act (2). And where a local board constituted under the Public Health Act (11 & 12 Vict. c. 63) had carried the whole drainage of the town into an adjacent river, a small stream which, immediately below the town, followed for three miles through the plaintiff's land on both sides; and the plaintiff was also seised of a mill upon the stream; and the quantity of sewage matter thrown into the stream was greatly increased, the population of the town having increased nearly one-half, and the extent of sewers from 250 yards in 1848 to 10,500 yards in 1855; and besides other evidence of that it appeared that sheep could no longer be washed there, that the fish were all dead, and that the exhalations were noisome; and the plaintiff had been in correspondence with the board on the subject of remedying the nuisance until the 19th of September, 1855, which was the date of the last communication in which they held out hopes of doing so; and the bill and information were filed on the 15th of January, 1856; Vice-Chancellor Sir W. P. Wood held, that the practice long previous and up to 1848 of a few houses in the town to drain into the river afforded no ground for the local board setting up a prescriptive right; and that the local board, as a modern corporation, could claim no prescriptive rights; that the stream was a private stream, the property of the plaintiff, and therefore that he had private ground of complaint to support the bill, as well as the public nuisance on which to found the information; and that the

(1) *Oldaker v. Hunt*, 19 Beav. 485; 6 De G. M. & G. 376.

(2) *Ib.*

board had no rights, except with his consent, under sect. 145; and that there was no such laches on the part of the plaintiff as to prevent him from having relief on the interlocutory application (1).

6. Where the defendants, the vestry of St. Mary, Lambeth, in exercise of the powers given by sect. 76 of the 18 & 19 Vict. c. 120 (the Metropolitan Management Act), had served the plaintiff with a notice requiring him in the construction of the drainage to certain houses, which were being erected by him in their district, to use stoneware pipes of the best quality, and the plaintiff used pipes of the Aylesford manufacture as coming within the description of stoneware mentioned in the notice to him; but the vestry, who required pipes of Lambeth manufacture, or of manufacture similar to that of Lambeth, to be used, objected, and refused, unless their requisitions were complied with, to make an opening into the main sewer for the plaintiff's drainage; and the plaintiff thereupon made the opening himself, and completed his drainage by means of Aylesford pipes; on a bill for an injunction to restrain the vestry from entering upon the plaintiff's premises for the purpose of taking up the drainage works so constructed by him, Vice-Chancellor Sir J. Stuart held, that the Act gave the vestry the right to determine which of the two materials should be used, and it appearing that the evidence of scientific men as to the comparative merits of the two manufactures was conflicting, the Court thinking, on the whole, that the vestry had not used a capricious discretion, and that the plaintiff had not complied with the regulation of the vestry, refused to grant an injunction, and dismissed the bill with costs (2).

7. A private Act of Parliament does not repeal a former private Act by implication, and therefore where a private Act of Parliament gave power to commissioners to construct a sea-wall, the property in which was to be vested in them, with liberty to proprietors of adjoining lands to purchase portions of the wall, and to make openings in it, under the superintendence of the engineer of the commissioners; the Lords Justices held, that under a subsequent Act empowering a dock company to take some adjoining

A private Act does not repeal a former private Act by implication.

(1) *Att.-Gen. v. Luton Local Board of Health*, 2 Jur. (N.S.) 180. (2) *Austin v. St. Mary, Lambeth* (Vestry), 4 Jur. (N.S.) 274, 1032; 27 L. J. (Ch.) 677.

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Guardians of
poor restrained
(here) paying
out of poor-
rates expenses
of an unsuc-
cessful appli-
cation to
Parliament.

lands, and to make such works for the purposes of their undertaking "as they might deem expedient," the power thus conferred was subject to the provisions of the former Act (1).

8. In *Attorney-General v. The Guardians of the Poor of Southampton* (2) the guardians of the poor of Southampton were restrained from paying out of the poor-rates the expenses incurred by them in making an unsuccessful application to Parliament for an Act to authorize them to rate the owners instead of the occupiers of small tenements, on the ground that from the facts of the case it was sufficiently manifest that what was intended to have been done by means of the application of the guardians to Parliament was unfair and inequitable. And where an Act of Parliament authorizing the execution of certain works for a public purpose, directed the rates to be levied thereunder to be applied by the commissioners to certain purposes enumerated, "and in repairing, extending, and enlarging the said works, and erecting new works, and in otherwise carrying this Act into execution," the Court, granting an injunction, held, that the commissioners had no power to apply the rates in payment of the expenses of promoting a bill in Parliament for extending and amending the former Act (3).

9. In *Armistead v. Durham* (4) the Court, upon a bill alleging overcharges, and the raising moneys by mortgages instead of rates, and excess in amounts in the proposed award, made an order for an injunction until further order to restrain commissioners under a local drainage Act from signing their final award, and from proceeding to enforce payment of rates, although the Act gave jurisdiction to the quarter sessions, on the ground that the circumstances disclosed were such as to induce the Court to say the defendants ought not to proceed until the questions in the case had been considered in a better state of facts, and in a more formal manner than they could be on the occasion of the motion, and this order was affirmed on appeal; but Lord Chancellor Cottenham attached to it the condition of bringing the money

(1) *Birkenhead Docks (Trustees of) v. Laird*, 4 De G. M. & G. 732.

(2) 17 Sim. 6; 18 L. J. (Ch.) 393; 13 Jur. 669.

(3) *Att.-Gen. v. Andrews*, 2 Mac. & G. 225; 2 H. & T. 431.

(4) 11 Beav. 556.

into Court. And where commissioners of sewers, under an Act of Parliament, are proceeding to pave and make sewers to the injury of property in a case not within the Act, this Court, unless expressly excluded, has jurisdiction to interfere; although by the Act jurisdiction is given to the justices at sessions, where judgment is not to be removed by a *certiorari*, or otherwise, into any of Her Majesty's Courts of Record at Westminster, or elsewhere (1). But in *Kerrison v. Sparrow* (2) the Court dissolved an injunction which had been obtained against the act of commissioners of sewers reducing the height of water in a river, on the ground that there was a much shorter remedy by *certiorari* in the Court of King's Bench, declaring that the Court of King's Bench interfered with great caution; but the Lord Chancellor, Lord Eldon, said that his decision was given without entering into the question whether there might, or might not, be cases in which a Court of Equity would not interfere.

10. Where an incorporated society took an interest in the proprietary shares, the Court held that such interest could not be taken away without the consent of the whole body; and that a majority of the members for surrendering the charter, and changing the nature of the institution, did not bind the minority; nor could the common seal be used for a purpose so directly opposed to the objects for which it was granted; and an injunction to restrain the applying it to the proposed deed of surrender, and against any alienation of the property, was granted, until the hearing (3).

11. In *Glass v. Marshall* (4), upon a bill by the father as administrator of his deceased wife, against his daughter, who, without any legal right, had taken possession of certain East India bonds which had belonged to her deceased mother, to restrain her from parting with the bonds, and against the East India Company to restrain them from paying the moneys secured by the bonds to the defendant, the daughter; Vice-Chancellor Sir L. Shadwell held, that the Court of Chancery had jurisdiction to restrain the East India Company from paying the money secured by thei

Court restrained East India Company paying moneys secured by bonds to a person who had wrongfully obtained possession.

(1) *Birley v. Constables of Chorley-upon-Medlock*, 3 Beav. 499.

(2) 19 Ves. 449.

(3) *Ward v. Attorneys' Society*, 1 Coll. 370.

(4) 15 Sim. 71.

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bonds to a person who wrongfully obtained possession of them, or to any other person than the lawful owner of them, and refused to dissolve an injunction restraining the East India Company from so paying the money secured by their bonds to the daughter, the wrongful holder of the bonds.

12. The Court, in *Reeve v. Parkins* (1), upon a bill for a dissolution, granted an injunction to restrain payments by the defendants, the committee and trustees of a friendly society, founded on erroneous principles, tending to exhaust its funds.

13. In *Salmon v. Randall* (2) it was held that the Commissioners appointed under the local Acts of Parliament for improving the town of Cambridge had, upon the true construction of those Acts, a continuing right to exercise from time to time the power thereby vested in them of taking property for the purposes of the Acts; and of referring the assessment of the price to a jury, so long as might be required for carrying into full effect the purposes contemplated by the Acts; and that a person whose property was required by the Commissioners for the purposes of the Acts was not entitled to restrain them by injunction for taking the steps prescribed by the Acts for obtaining possession of the property, until they should have shewn a sufficient fund to satisfy the price which might be awarded to him, or until they should have shewn the means by which they proposed to incur it.

14. Where a brewer and coal dealer on the banks of a fleet or tidal creek carried on trade by means of barges, &c., and the Commissioners under the Towns Improvement Act of 1847, and other special Acts, arched over portions so as to prevent the use of the creek for navigable purposes, and he claimed compensation, but subsequently protested against the act as illegal, and filed a bill to restrain the interference and for a mandatory injunction; Vice-Chancellor Sir R. T. Kindersley held, that the Legislature by the Acts in question drew a distinction between sewers and drains and fleets, the sewers and drains only being vested in the Commissioners; and that, therefore, he was entitled to an inquiry as to damages, with a direction to pay the same, when ascertained, to him, and that his claim for compensation was no acquiescence, because he was then ignorant that they were doing an illegal act, and took proceedings

A claim for compensation is no acquiescence where there is ignorance of the fact that the act is illegal.

(1) 2 Jac. & W. 390.

(2) 3 Mr. & Cr. 439.

as soon as he was aware of it (1). And a mere allegation in an affidavit of the suit being at the instigation of a third person, although not denied, is not sufficient proof of the fact, although, if, proved, the Court would refuse relief on that ground, and the defendants were ordered to pay the costs of the suit (2).

15. Where the Temple Pier, erected under a license from the Conservators of the Thames, determinable by seven days' notice, was purchased and managed by a company, and the Metropolitan Board of Works, under the provisions of the Thames Embankment Act of 1862, (which incorporates the Land Clauses Act of 1845, with the additional provision that the word "lands" shall include easements and interests in land, and which gives express power to alter and divert piers), altered and diverted the pier temporarily, to enable them to prosecute the embankment works, yet not so as to interrupt the use thereof, and proposed eventually to build, as nearly as might be at the same spot, a new pier in place of the old one; and the Conservators refused to grant any license to the company with respect to the proposed new pier; Vice-Chancellor Sir W. P. Wood, upon a bill to restrain the removal of the pier until the defendants had made or secured adequate compensation in the manner provided by the Acts in that behalf, held, that the Metropolitan Board were not taking or permanently using any land or easement enjoyed by the company, so as to necessitate the assessment and payment of compensation (pursuant to the 84th section of the Lands Clauses Act) before dealing with the pier in the manner mentioned (3).

16. Where an application had been made under 8 & 9 Vict. c. 118, to the Inclosure Commissioners to inclose lands alleged by the parties applying to be common lands, but alleged by the plaintiff to be his own exclusive property, and the Commissioners had given time (at least eleven months) to the plaintiff to vindicate his right, but he brought no action at law, and he afterwards filed a bill to restrain the defendants from proceeding before the Commissioners; Vice-Chancellor Sir W. P. Wood held, upon demurrer, that the Court would not interfere, the Commissioners not having acted

(1) *Pentney v. Lynn Paving Commissioners*, 13 W. R. 983.

(2) *Ib.*

(3) *Temple Pier Company v. Metropolitan Board of Works*, 34 L. J. (N.S.) (Ch.) 262; 13 W. R. 535.

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wrongfully, and this not being a case of irremediable damage, as the plaintiff would only be put to bringing his ejectment after the award of the Commissioners (1).

A breach of an injunction in behalf of public interests is no defence against rights of an individual.

17. It is no defence as against the rights of an individual that a breach of an injunction has been incurred in behalf of public interests (2); and a writ of sequestration will issue against a board of health where a breach of an injunction has been clearly committed (3). And on appeal it was held that the superior Court would not suspend the execution of the writ, and that any application for such a purpose must be made to the Court below (4).

18. The 83rd and 85th sections of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 120), do not apply to the case of the mere removal of a building from an adjoining building without disturbing the party structure, and no previous notice under the Act need in such case be given (5). But the Vice-Chancellor, Sir W. P. Wood, said that if he had been satisfied that any part of the defendant's building itself formed a part of the "party structure," he should have been disposed to agree with the plaintiff's contention that the removal of the defendant's building would amount to a dealing with the party structure so as to render notice under the Building Act necessary; and the plaintiff's bill to restrain the defendants from pulling down, &c., the party structure separating the plaintiff's premises from the defendants was dismissed, the defendants undertaking, if required, to make good the damage done by them (6).

A plaintiff is justified in filing a bill to restrain defendants proceeding on an invalid notice, refused to be withdrawn.

Where the defendants gave notice under the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122) s. 85, to the plaintiffs, that they intended to pull down and rebuild a wall of the plaintiffs, which they described in the notice as a party wall, and the wall was not a party wall, but an external wall; and the notice was therefore invalid, and the defendants were frequently applied to by the plaintiffs to withdraw the notice, but they refused to do so, though they said they did not intend to act upon it; Vice-Chancellor Sir W. P. Wood held, that the plaintiffs were justified in filing a bill

(1) *Harris v. Jose*, 14 W. R. 303.

(2) *Spokes v. Banbury Local Board of Health*, 35 L. J. (Ch.) 105.

(3) *Ib.*

(4) *Ib.*

(5) *Major v. Park Lane Company*, L. R. 2 Eq. 453.

(6) *Ib.*

to restrain the defendants from proceeding on the notice (1). And this statute does not oust the powers of the Court of Chancery in a case which is not within the Act at all (2).

19. The purport of the 54th section of the Metropolitan Gas Act of 1860 is to protect the rights of such companies or persons who at the time of passing the Act manufactured and supplied gas to others than the public; and railway companies and hotels in connexion with them do not constitute "the public" within the meaning of the section. And the Vice-Chancellor, Sir J. Stuart, dismissed with costs the plaintiff's bill to restrain the defendants from supplying gas for sale to the Great Western Railway Company, or to any other company or person (more particularly the Great Western Hotel Company and the Bishop's Road Station of the Metropolitan Railway Company) within the districts or limits in which the plaintiffs had an exclusive right to supply the public by the terms of the above Act (3).

20. On a petition suit in Ireland, instituted by three graduates and members of the Queen's University, against the senate of that university, praying that the Queen's University, in Ireland, and the senators thereof who were named as respondents, might be bound by the proceedings, and for a declaration that a supplemental charter of 1866 was of no force or effect in relation to the university, and that the said respondents, and each and every one of them, their agents and officers, might be restrained by the injunction of the Court from surrendering a charter of 1864, or any part thereof, and from accepting or acting upon the said supplemental charter, or any other charter, inconsistent with the said charter of 1864; and from affixing the common seal of the university to any instrument or writing surrendering the said charter of 1864, or purporting to do so; or accepting, or purporting to accept, the said supplemental charter, and from doing any act inconsistent with the provisions of the said charter of 1864, or with the 8 & 9 Vict. c. 66, "An Act to enable Her Majesty to endow new Colleges for the advancement of Learning in Ire-

(1) *Sims v. Estate Company*, 14 W. R. 419; 14 L. T. (N. S.) 55. *Company v. West London Junction Gas Company and the Great Western Railw. Co.*, 14 W. R. 1019.

(2) *Ib.*

(3) *Imperial Gaslight and Coke*

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A member of a corporation cannot institute a suit against the governing body unless there is an infringement of a personal or a proprietary right, or an injury to him as an individual. Where a university is incorporated by charter under a visitor, all matters relating to internal management of the *domus*, as to examinations, &c., are under exclusive control of visitor.

land;" and from doing any act whereby the rights and privileges of the petitioners under the said charter of 1864, as members of the Queen's University in Ireland, might be in any way abridged or interfered with; and an interlocutory injunction had been obtained without any expression of opinion on the merits; the Court, in delivering final judgment, held that a member of a corporation cannot institute a suit against the governing body of the corporation unless there is also an infringement of a personal or a proprietary right, or an injury to him as an individual; and that it must be by the corporation itself, or by information by the Attorney-General, if it is for an injury to the public; and that the loss of a monopoly of university degrees was not a personal injury, and dismissed the petition (1). But where a university is incorporated by charter under a visitor, all matters relating to the internal management of the *domus*, as to passing resolutions, holding examinations, conferring degrees, &c., are under the exclusive control of the visitor, and a Court of Law or Equity has only jurisdiction with respect to matters out of the house, as between the university and third persons; and, therefore, where the plaintiff, having obtained a gold medal from the University of London, at their examination for the degree of doctor of laws, filed a bill to restrain them from giving another gold medal for the same examination to one of the defendants, which the senate proposed to do; on the ground of an alleged miscarriage in the mode which the examiners had adopted in ascertaining his highest number of marks; Vice-Chancellor Sir R. T. Kindersley allowed a general demurrer by the university for want of equity (2).

21. Where, by a local Act of Parliament (57 Geo. 3, c. 29), power was given to the commissioners of sewers to widen the streets within their districts, and if any houses, lands, &c., or any part thereof, should be adjudged by them to project into or obstruct such streets, to make the purchases necessary for the purposes of the Act, and power was given to them to contract with the owners and occupiers, and to pull down, use, sell, or dispose of such houses, &c., and the materials, and lay the sites thereof, and

(1) *McCormac v. Queen's University*, *don*, 12 W. R. 733; 10 Jur. (N. S.) 15 W. R. 733, M. R. Ir. 669; 33 L. J. (Ch.) 625.

(2) *Thomson v. University of Lon-*

also such other lands, or so much thereof as the commissioners should think proper, into the said streets, and the commissioners having adjudged that it would improve a certain street if a piece of land, parcel of the site of a house in the street, was cleared and thrown into the street, caused the occupiers to be served with notice to treat for the sale of the whole site; Lord Chancellor Chelmsford, upon an appeal from an order of Vice-Chancellor Sir R. T. Kindersley, granting an injunction to restrain the commissioners of sewers from taking the whole of a house in Threadneedle Street, held, affirming that decision, that the commissioners had no power to purchase, compulsorily, the whole site of the house, but only so much as they had formally adjudged necessary for the improvement of the street, and they cannot take the whole unless they have formally adjudged that possession of the whole is necessary for the purpose of executing their powers (1).

22. A stockholder and creditor in a corporation is entitled to an injunction and a receiver where the trustees have undertaken to sell to a new company, in which they were largely interested, substantially the whole property and interest of the corporation (2).

23. An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges (3).

24. A corporation, constructing works beyond what is necessary for the purposes of the incorporation, and beyond what is contemplated by the charter, will be restrained by injunction (4). Chancery will interfere to prevent a disposition of the property of a corporation for other than corporate purposes, upon a proper case made out; but as to what is a proper case, the Court will be guided by the general principles upon which it usually exercises its powers (5). So a corporation, proposing illegally to lease an important ferry for ten years may be enjoined (6). Equity will enjoin the use of a district school-house for religious meetings and

Injunction granted to restrain sale by trustees of one corporation to another company in which they were largely interested.

Injunction granted to restrain corporation constructing works beyond powers of charter,—to prevent disposition of property for other than corporate purpose, and from making an illegal lease.

(1) *Thomas v. Daw*, L. R. 2 Ch. 1; 36 L. J. (Ch.) 201.

(2) *Abbot v. American, &c.*, 33 Barb. 578 (Amr.)

(3) *Osborn v. Bank of the United States*, 9 Wheat. 738 (Amr.)

(4) *Newark, &c. v. Elmer*, 1 Stockt. 754 (Amr.)

(5) *Kean v. Johnson*, 1 Stockt. 401 (Amr.)

(6) *People v. New York*, 32 Barb. 102 (Amr.)

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Court will restrain a bank from violating the provisions of a statute or charter.

Sunday-schools by vote of the district, on the application of any taxpayer, however slightly injured (1).

25. In *Com. v. Bank, &c.* (2), it was held that there should be an injunction against a bank for not keeping on hand an amount of specie equal to fifteen per cent. of its liabilities, for circulation and deposits, under General Statutes, c. 57, s. 19 (U.S.). But it was further held, that if a bank has violated the provisions of a statute under a mistake or misapprehension of the law, and with no wilful intent of violation, and it is not alleged that any other or further like acts are threatened or intended, a temporary injunction may be dissolved on payment of costs. So, where by the charter of a bank, a majority of the directors, the president being one, were to form a board or quorum for the transaction of any business, "but ordinary discounts may be made by the president and four directors;" "the rate of discount shall not exceed one-half of one centum for thirty days;" and the cashier and president discounted paper without four directors, and paper was discounted at a higher rate than that above stated; it was held a temporary injunction should be granted against the bank (3).

SECT. 3. *Quasi Corporations Aggregate.*

1. Where the trustees of a turnpike road, which passed over a hill, had been empowered to lower it when necessary, and they applied to restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road, the Master of the Rolls, Lord Langdale, held that the Court had no authority to interfere, and refused the application; his Lordship said that he did not think that this Court had authority to interfere with the right of property to the extent required to protect the trustees from the future contingency, namely, that the exercise of their right of improving the road might be affected by the act of the freeholder (4).

2. Where a society (Odd Fellows) has not availed themselves

(1) *Schofield v. Eighth, &c.*, 27 Conn.

499; see *Sheldon v. Centre, &c.*, 25

Conn. 224 (Amr.)

(2) 4 Allen, 1 (Amr.)

(3) *Manderson v. Commercial, &c.*,

28 Penn. 379 (Amr.)

(4) *Cunliffe v. Whalley*, 13 Beav.

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of the protection of the Friendly Societies Act, and the constitution and purposes of the society or association are of such a nature, and the parties so numerous, that no Court of judicature could execute or deal with the society or association beneficially, or act upon efficaciously; Vice-Chancellor Sir J. L. Knight Bruce, in *Clough v. Ratcliff* (1), asked whether it was the duty of the Court to acknowledge an agreement of that kind, and whether the association and members of the society must not be left to regulate themselves by a moral rule, without judicial interference, the Legislature having neither recognised such agreement between the parties, nor given the Court a jurisdiction how to regulate them; and the Vice-Chancellor said that he doubted whether the contract of partnership (if that was a proper term), or of association for mutual assistance, or however it should be designated, which was the foundation of the suit, was not shewn by the bill here to be a contract so circumstanced that the principles and rules of the Common Law could not be considered as sanctioning it, and whether a Court of Equity (if not bound by statute to recognise) ought to recognise it. In this case upon a bill filed by certain members of a lodge forming part of an association called "The Independent Order of Odd Fellows" (which consists of many corresponding lodges and many thousand members), against other members of the lodge, complaining of being excluded from the lodge, and praying for a declaration that such exclusion was illegal and void, and for an injunction to restrain the defendants from applying a sum of £148 3s. 4d. otherwise than according to the rules of the lodge, and for an account (if necessary) of all the property and funds of the lodge, and a declaration of the rights and interests of the parties, and for all necessary directions for giving effect thereto, and for an injunction and receiver and general relief: the Court held, on demurrer, that this was not a case in which an injunction would be proper without other relief, or without view to other relief; and that it did not belong to the function of the Court to make a decree containing declarations of right alone (2); or, in such a case as the above, a declaration of right and an injunction only; and further, that the only relief sought indepen-

(1) 1 De G. & Sm. 164; 16 L. J. made under the 15 & 16 Vict. c. 86,
(N. S.) Ch. 476; 11 Jur. 468. s. 50.

(2) But such decrees can now be

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dently of this injunction, was such as the Court could not grant with the parties then before it; and that, as the defect could not be remedied without rendering this suit unmanageable, leave to amend ought not to be given.

3. Upon a motion—at the suit of some of the ratepayers of the parish of Marylebone on behalf of themselves and others, against some of the vestrymen of the parish and the vestry-clerk—for an injunction to restrain the vestrymen of the parish from borrowing money upon the several parish rates, from applying the burial-fees to other purposes than those to which such rates are applicable, from repaying to their bankers the money lent upon the rates, and from mixing or blending together the different rates collected in the parish; it was held, that the injunction must be granted; but that part which would restrain the defendants from repaying the bankers was directed to stand over until the legality of the last rate, alleged to have been made for the purpose of repaying them, and also for paying the yearly expenses of the parish, should have been tried at Law (1). But the injunction of the Vice-Chancellor in this case was not sustained by the Lord Chancellor, so far as it restrained the vestry from borrowing any money on the security of any of the rates; but they have no power to apply the produce of one class of rates to objects for which they are empowered to raise another class of rates; and they have no power to make good the deficiencies of any one of the rates out of the produce of the other rates; though it is in the power of the vestry to borrow on the security of any particular rate; but they cannot pledge any other rates as a security; that is, they cannot borrow in aid of one rate on the security of another (2). In *Ellis v. Earl Grey* (3) Vice-Chancellor Sir L. Shadwell overruled a demurrer to a bill praying an injunction to restrain the Lords of the Treasury from paying the compensation awarded under 11 Geo. 4 & 1 Will. 4, c. 68, for the office of side clerk in the Exchequer, which had been abolished. The Vice-Chancellor said that he was of opinion that the bill did not seek to interfere with any public duty which the Lords of the Treasury had to discharge, or with any discretion which they had to exercise in their public capacity. But that it sought to

The Court will, with a view to secure money for the party entitled, sustain a bill against the Lords of the Treasury in respect of a mere ministerial act.

(1) *Att.-Gen. v. Daniel*, 4 Jur. 793, 790; 9 L. J. (N. S.) Ch. 394.

(2) *Ib.*

(3) 6 Sim. 214.

restrain them from doing a mere ministerial act, with a view to secure the money for the parties who might be decreed to be entitled to it.

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4. The inhabitants of a parish or district, as distinct from the general public, may possess a right of way, but it must be by express grant, and cannot be presumed from user (1). The dedication of a right of way can only be presumed from user in favour of the public (2).

The inhabitants of a parish, &c., may possess a right of way by grant. A right of way can only be presumed from user, in favour of the public.

5. Where the rules of a club authorized the committee to call a general meeting "in case any circumstances should occur likely to endanger the welfare and good order of the club," and provided that any member might be removed by the votes of two-thirds of the persons present at such meeting; on a bill filed by a member so removed praying a declaration that so long as he conformed to the rules of the club he was entitled to participate in the use and enjoyment of the property of the club, and in its rights and benefits, and that the defendants might be restrained from excluding the plaintiff from such rights and benefits, and from removing his name from the list of members; the Master of the Rolls, Lord Romilly, held, that, as, in the judgment of the Court, the meeting was fairly called, and the decision adopted was *bonâ fide*, and not through any caprice, such decision was final, and the bill was dismissed with costs (3). When the committee of a club have power to expel any member whose conduct is in their opinion injurious to the interests of the club, and they exercise this power, all that is required is that the committee should form their opinion in a *bonâ fide* way; and the question whether their opinion is just or unjust is immaterial. And where two members of a club, concerting together, returned to a third member a number of circulars issued by him, sending them back in unpaid envelopes, addressed in an annoying way; and one of the two members also sent one of the circulars unpaid to the committee of another club, to which the third member also belonged, and put the third member's initials outside the envelope; and the third member complained to the committee

A member of a club may be expelled by a meeting authorized by the rules fairly called, and upon a *bonâ fide* decision and not through caprice.

The committee of a club authorized by the rules, may expel a member upon an opinion formed *bonâ fide*. This Court will not consider whether the committee acted rightly or wrongly.

(1) *Bermondsey Vestry v. Brown*, 11 Jur. (N. S.) 1031; *v. S. C. ante*, p. 48; § 7, pl. 1.
(2) *Ib.*

(3) *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; 37 L. J. (Ch.) 173; 16 W. R. 266.

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of the club, charging one of the two members with the whole offence, and describing the last-mentioned act as "forging his initials for an unworthy purpose;" and the committee having ascertained that the individual charged had only sent half the circulars to the complainant, and that the envelope bearing the plaintiff's initials was not sent by him, nor with his express knowledge, expelled the complainant from the club; and the expelled member filed a bill against the committee of the club (the Junior Carlton) to have it declared that the sentence of expulsion was void, and moved for an interlocutory injunction to restrain the defendants from enforcing it; the Master of the Rolls, Lord Romilly, held that the Court could not interfere. The Master of the Rolls said, as he pointed out in *Hopkinson v. Marquis of Exeter* (1), "That these clubs are formed entirely for social purposes, and there must be some

The Court will only interfere where there is a moral culpability, as fraud, personal hostility, or bias.

paramount authority to keep up their objects. In some cases this Court will interfere with the exercise of that paramount authority, but only where there is a moral culpability, as if the decision is arrived at from fraud, personal hostility, or bias. But in cases of this description all that this Court requires is to know that the persons who were summoned really exercised their judgment honestly. The Court will not consider whether they did so rightly or wrongly. In the present instance, the rule says that 'in case the conduct of any member either in or out of the club-house, shall, in the opinion of the committee, be injurious to the character and interests of the club, the committee shall be empowered to recommend such member to resign.' If the member did not resign within one month from the date of the letter recommending resignation, the committee were empowered to expel the member. And the Master of the Rolls said, "it is not if the conduct is really injurious, but if it is injurious in the opinion of the committee; then all that the Court requires is that the committee shall form their opinion in a *bonâ fide* way. There is no power in this Court to control the judgment or opinion of the committee" (2).

A building society has no power to borrow except for the purposes and to the extent speci-

6. A building society has no power to borrow except for the purposes and to the extent specified in its rules. The officers of a building society have no power to deposit the mortgages held by it as security for a loan from its bankers; and the persons who

(1) *Supra*.

(2) *Gardner v. Fremantle*, 19 W. R. 256, 259.

authorize are jointly liable with those who actually give a security for an improper loan. Though bankers are also treasurers of a building society, an account will not be decreed against them if their pass-book has been inspected and approved in the usual manner as between banker and customer (1).

filed in its rules—No account against bankers, treasurers of a building society, if pass-book inspected and approved in usual way.

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7. Where a bill was filed against the trustees of a benefit building society for a declaration that one of the society's rules, which had been certified by the Registrar of Friendly Societies, was invalid, and praying that the rule should be set aside, to restrain the defendants from borrowing money, paying interest, or making advances to any member until the money already borrowed had been paid off; Vice-Chancellor Sir R. Malins overruled (reserving the costs) a demurrer to the bill for want of equity (2). The Vice-Chancellor said, "the certificate of the barrister (the registrar) was only conclusive on matters within his jurisdiction. Was such borrowing and lending as this repugnant to the Act? (6 & 7 Will. 4, c. 32.) These points could be decided at the hearing. The Court could not put an end to the litigation at this stage;" and that he could not say whether the barrister's certificate in this case was final, or that the transactions alleged were within the object and purview of the society. But, upon appeal, the Court held that a rule empowering the trustees of a building society to borrow a limited amount of money, for the purposes of the society, is not illegal, under the Building Societies Act (6 & 7 Will. 4, c. 32), and allowed the demurrer; and held that the certificate of the barrister appointed to certify rules under the 6 & 7 Will. 4, c. 32, is not conclusive as to the legality of a rule (3).

Trustees of a building society may be empowered to borrow a limited amount of money, for the purposes of the society.

SECT. 4. *Quasi Corporations Sole.*

1. If the real objects of all parties to the suit are in common, and no danger threatened to the public, the Court will not grant an injunction; so held, by Vice-Chancellor Sir R. T. Kindersley,

If the real objects of all parties are in common, and no danger

(1) *Moye v. Sparrow*, 18 W. R. 400; 17 W. R. 784; 18 W. R. 76; 39 L. J. 22 L. T. (N. S.) 154. (Ch.) 1; 21 L. T. (N. S.) 83.

(2) *Laing v. Reed*, L. R. 5 Ch. 4; (3) *Ib.*

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threatened to
public, no
injunction will
be granted.

in a case where a local board of health filed a bill for an injunction against the Secretary-at-War to restrain him from stopping up a ditch, the War Office having nearly filled the ditch with soil, and made only a small grip or cutting in the place of the old passage; the local board alleging injury to certain sanitary measures of their own, as representing the public, who were entitled to the free user of the ditch; the Vice-Chancellor said that there had been no such injury or invasion by the defendant, the Secretary-at-War, of the public rights contended for by the plaintiffs, as to require an injunction against him (no one appeared for the defendant) (1).

(1) *Felkin v. Herbert (Lord)*, 9 W. R. 496.

CHAPTER VI.

ECCELESIASTICAL MATTERS—BURIAL GROUNDS, &c.

1. Where by a trust deed, executed in 1841, land and a chapel at Ramsgate had been conveyed to trustees, at all times thereafter to permit the chapel to be used, occupied, and enjoyed as a place for public religious worship by the society of Protestant Dissenters of the denomination called "Particular or Calvinistic Baptists," and by such other persons as should thereafter be united to the society, and admitted members thereof; Vice-Chancellor Sir R. T. Kindersley held, that the doctrine of open, or mixed, or strict communion was not an essential doctrine of every Particular Baptist church, that it was a matter and order of practice, which, as each church was a complete and distinct body of Particular or Calvinistic Baptists in itself, each church had an inherent right to vary, and still remain a Particular Baptist church; and that a large majority of the congregation having arrived at the conclusion that unbaptized persons might be admitted to the communion, such a practice was not a breach of the trusts of the deed; and the Vice-Chancellor refused an injunction to restrain the minister and some of the trustees from admitting to church membership or communion persons who were not Particular or Calvinistic Baptists (1). And in *Att.-Gen. v. Gould* (2), upon an information and bill instituted at the relation of the trustees and two members of a chapel at Norwich, belonging to the congregation of "Particular Baptists," on behalf of themselves and all other persons interested in the trust property, against the minister and the other trustees, to restrain the practice of free communion in the chapel; the Master of the Rolls, Sir J. Romilly, on the evidence, came to the conclusion that

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The doctrine of open, or mixed, or strict communion is not an essential doctrine of every Particular Baptist church.

(1) *Att.-Gen. v. Etheridge*, 32 L. J. (Ch.) 161; 11 W. R. 199; 8 L. T. (N.S.) 14.

(2) 28 Beav. 485.

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In cases of charities usage is only important where there is absence of instrument of endowment, or the words are ambiguous.

each congregation of Particular Baptists had a right to regulate its own practice, except as to essential and fundamental doctrines of their faith. That the doctrine in dispute was not one of that character, but was an open question, and that the majority of full members might, notwithstanding a contrary usage since 1746, alter the practice in respect of communion, and adopt the practice of free communion, or of strict communion, as they should from time to time think fit to determine. In cases of charities, usage is only important where there is an absence of any instrument of endowment, or where the words of the instrument produced are ambiguous. In such cases usage constitutes presumptive evidence of the trusts on which the charity was established; but when the deed of foundation is produced, and is precise, that presumption is excluded. And where some members of a seceding congregation in Scotland had acquired a piece of ground, upon which they built a chapel, which was conveyed to trustees, to be held by them "in trust and for behoof of the Associate Congregation of Original Seceders, to whom solely, and those who shall in time coming accede to them, and continue in adherence to the original principles of the secession, the subjects shall belong;" and all questions of adherence to such principles were to be determined in a certain manner; and the congregation continued to use the chapel, when a majority, including the minister, joined another seceding body, which was considered to hold the same doctrines; and afterwards certain members, forming part of the minority of the original congregation, instituted a suit to have it declared that the chapel belonged to, and was to be held for the use of, those only who adhered only to the original doctrine; the House of Lords held, affirming a decision of the Court of Session (Second Division), that the plaintiffs had by their own conduct acquiesced in the proceedings, and for that reason the appeal was dismissed (1). The House of Lords said the plaintiffs had not commenced proceedings for above three years after they had known of the union of the congregations and appointment of the minister of the united church. The House ruling, that though where the Attorney-General sues in the Court of Chancery for the vindication of a public charity, neither acquiescence nor lapse of time will be any

Acquiescence and lapse of time are a bar to relief in respect of

(1) *Cairncross v. Lorimer*, 3 Macq. H. L. C. 827; 7 Jur. (N. S.) 149.

bar to the proceedings—and that a similar principle appears to hold in Scotland—there is no such principle or rule where the suit is instituted by private persons in a matter affecting solely their own individual interests; on the contrary, in such a case acquiescence and lapse of time will be a bar. And where, in 1710, certain members of a Presbyterian congregation in Dublin had set on foot a subscription for the purpose of forming a fund for charitable purposes, which, by a deed of trust, was declared to be for the support of religion in and about Dublin and the south of Ireland, by assisting and supporting the Protestant dissenting interest against unreasonable persecutions, and for the education of youth designed for the ministry among Protestant dissenters, to be chosen out of five congregations, and to assist poor Protestant congregations, and for such other pious and religious ends and by such means as the subscribers should think proper for promoting these objects; and the funds subscribed were vested in trustees chosen; and at the date of this deed there was no Toleration Act for Ireland; and in course of time Unitarian doctrine sprang up in several of these congregations, and for many years past portions of the income of the fund had been applied to Unitarian purposes; upon an information filed against the trustees, the House of Lords held, affirming the decision of the Lord Chancellor of Ireland, that the expression “Protestant dissenters” had no such known legal meaning as to prevent the admission of evidence, and that theological works of the period, contemporaneous documents, and usage, the acts of the party, and the circumstances in which he was when he made the deed, but not his particular opinions or declarations, might be admitted in evidence to shew the meaning of those words as understood and used by the authors of the trust; that Unitarian Protestant dissenters were not within the trusts of the deed, and are not entitled to be considered as objects of the trust; and that it was not open to Unitarians claiming under the trust to contend that the trust was originally invalid by reason of there not having been any Toleration Act at the date of the deed; that although contemporaneous usage and long enjoyment afford grounds for the interpretation of doubtful words in a trust deed, they give no sanction to a breach of trust, and long enjoyment of the Unitarians created no right, as time affords no

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charities
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The expres-
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legal meaning
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evidence to
shew the
meaning of
those words as
understood by
the author of
the trust.

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sanction to establish breaches of trust; and that Trinitarian trustees who had concurred in the breaches of trust should be removed as well as the Unitarian trustees (1). And where a chapel in England had been founded between the Restoration and the Revolution without any deed or document declaring the purposes for which it was to be used, but it appeared that from the foundation the services had always been conducted in conformity with "The Directory," by which the mode of worship in the Church of Scotland is regulated; the Court held that the chapel must be treated as appropriated to the purposes of religious worship according to that Directory, and therefore according to the Presbyterian form. And where a minister of such a chapel had been ordained by a Scotch Presbytery, and afterwards became a minister of a synod assembled in England, which adhered to certain resolutions respecting church patronage in Scotland; and subsequently a general assembly of the Church of Scotland enacted that all members of that synod who so adhered were no longer members of, or in communion with, the Church of Scotland; the Court—upon an information and bill by four of the trustees of the chapel against M., the officiating minister of the chapel, and the trustees who were not plaintiffs, praying (*inter alia*) for a declaration that the chapel and premises were subject to trusts for the appropriation of the same as a place of public religious worship on the model of the Church of Scotland, and in as strict connection with the same as was practicable; and that no person was qualified for or competent to exercise the office of minister or pastor thereof without being a licentiate and a recognised minister of the Church of Scotland and in full connection therewith; and that the defendant M. might be restrained from occupying and using the pulpit, and from preaching and teaching in, and in any manner officiating as the minister or pastor, and, if necessary, removed; that the defendants, trustees who had concurred with M., might be restrained from allowing the use of the pulpit to any person, and from permitting any person to preach or teach in the chapel, otherwise than as a place of public religious worship on the model and strict connection above mentioned—held that the minister was thereby deprived

(1) *Drummond v. Att.-Gen.*, 2 H. mon. 1 D. & War. 353, and see 3 D. L. C. 837; affirming *Att.-Gen. v. Drummond*, 1 D. & War. 165; 1 Con. & L. 210; 2 Id. 93.

of his status of an ordained minister of the Scotch or of any Presbyterian church, and became disqualified from acting as the minister of the chapel (independently of any question whether it was necessary for him to be a Scotch minister or licentiate), it being an essential part of the Presbyterian system that none but ordained ministers or licentiates should perform divine service; and, *semble*, (*per* Lord Justice Knight Bruce) that with respect to a question of property it is competent for a congregation of dissenters, acting unanimously, and with the concurrence (where they have trustees) of their trustees, to introduce effectually into their system and constitute new regulations not in contravention of any deed of trust, and not opposed in principle to the original constitution; and that it is competent for such a congregation in England to resolve effectually, though not irrevocably, that every future minister shall be a person in communion with the established Church of Scotland. The effect of usage as evidence of the trusts on which a dissenters' place of worship is held, varies greatly in different circumstances, and the Court of Appeal (*i.e.*, the two Lords Justices) differing in opinion upon the evidence, whether it was a necessary qualification for a minister of a particular chapel to be a minister or licentiate of the Church of Scotland, the decree of the Court below, declaring that qualification to be necessary, was affirmed (1). And where, by an agreement made in 1794, a plot of land and certain premises thereon, situate in Oldham Street, Liverpool, were vested in trustees, to be used as a place of religious worship "according to the ordinances, rules, and forms of the Church or Kirk of Scotland," and a subsequent conveyance was made of the same land and premises to the trustees, "to be for ever thereafter appropriated and used as a place for divine worship according to the doctrines and discipline of the Church of Scotland;" and the premises were thenceforward occupied as such place of worship; and the office of minister or pastor of the congregation was filled from time to time by licentiates of the Church of Scotland, who were ordained and inducted by presbyteries of Scotland; and in 1833 a Lancashire Scottish Church presbytery was formed, to which the Oldham Street congregation united themselves, and the Lancashire presbytery, and other presbyteries in England, in 1836,

(1) *Att.-Gen. v. Murdoch*, 1 De G. M. & G. 86; 7 Hare, 445.

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united themselves into an English synod, which synod was, in 1839, recognised by the General Assembly of the Church of Scotland; and in 1842 a licentiate of the Church of Scotland, by license from the presbytery of Greenock, was ordained and inducted as minister of the Oldham Street church, according to the presbyterian forms, by the Lancashire presbytery; and in 1843 certain ministers and members of the Church of Scotland adopted the name of the Free Church, and seceded from the Established Church, and were declared by that church to be no longer ministers thereof; and the English synod declared its disapproval of the conduct of the Established Church of Scotland, and its sympathy with the Free Church, recognising the latter as a sister church, and resolving to interchange ministers therewith; and the minister of the church and the trustees of the premises in Oldham Street co-operated with the seceders by allowing ministers of the Free Church to officiate in the church in Oldham Street; and the minister who was deprived of his license by the presbytery of Greenock also continued to officiate; the Court held, upon motion, that the minister and trustees had departed from the trusts created by the original contract upon which the premises in Oldham Street were vested in them, and that the Court would interfere by injunction, before the hearing, to prevent the premises in Oldham Street from being used otherwise than as a place of religious worship on the model of the Church of Scotland as established by law (1).

2. Where the members of the synod of Australia (an ecclesiastical body formed by presbyterian congregations in Australia in connexion with the established church of Scotland, and recognised by a local Act of the colony), filed a bill against the minister and trustees of a church (which was by virtue of the Act placed under their spiritual and ecclesiastical jurisdiction, but which no member of the synod, except the minister of the church, attended—nor, did any such member contribute to the funds out of which the church was built) praying that the minister might be forbidden to officiate in the church, on the ground that he had been deposed therefrom by the synod, and that he and the other defendants, the trustees of the church, might be removed from the trust and

(1) *Att.-Gen. v. Welsh*, 4 Hare, 572.

required to deliver up possession of the church to the synod; the Privy Council held, that the members of the synod were strangers to the trust, and, as such, were not entitled to institute such a suit; and further, that such a suit must be maintained either by some person or persons having an interest in the subject matter, or by some public officer intrusted by law with authority to institute such a suit; and also that the sentence of the synod having been pronounced in 1842, and the suit not having been commenced till 1855, and no satisfactory explanation having been given of the delay, the synod was precluded by the lapse of time from instituting the suit (1). And where the right of electing a minister of a parish had been by deed vested in trustees upon trust for the parishioners and inhabitants, who had accordingly exercised the right of electing a minister at vestry meetings; upon a bill by two of the parishioners and inhabitants of the parish of St. James, Clerkenwell, on behalf of themselves and the other parishioners, against the vestry of the parish, the trustees of the advowson, M., the minister elected, and the bishop; the Lords Justices, upon an appeal from a decision of Vice-Chancellor Sir R. T. Kindersley, upon a motion for an injunction to restrain the trustees of the advowson from presenting M., the minister—who had been elected by the vestry appointed under the above Acts—to the bishop for induction, and the bishop from inducting him, reversed the decision of the Vice-Chancellor, and granted the injunction, holding, that upon the construction of the “Act for the better Local Management of the Metropolis” (18 & 19 Vict. c. 120), and of the Amendment Act (19 & 20 Vict. c. 112), that this right of election had not become vested in the new vestry appointed under the former Act, but remained unaffected by either Act (2). And where the governing body, the elders and deacons of the French Protestant Church in London, which formed a section of the corporation of the Foreign Protestant church founded in 1550 by letters patent of the Crown, whose pastor, when elected, was presented to and approved and instituted by the Crown, having, apart from the charter of incorporation, funds impressed with a trust in favour of

(1) *Lang v. Purves*, 8 Jur. (N. S.) G. 680; 2 Jur. (N. S.) 1200; 3 Jur. 523; 5 L. T. (N. S.) 809. (N. S.) 171.

(2) *Carter v. Cropley*, 8 De G. M. &

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the pastor, had dismissed the pastor; the Master of the Rolls, Sir J. Romilly, upon a suit by the pastor praying for a declaration that he had not been lawfully dismissed from his office of pastor, and that the defendant the Reverend M. had not been duly appointed pastor; and for an injunction to restrain the defendants from preventing the plaintiff from discharging his duties as pastor; held, that the Court, notwithstanding the rights of the Crown as visitor, had jurisdiction to see to the performance of the trust and to determine on the validity of the dismissal; and the Court having come to the conclusion that it was not justifiable and was void, the governing body having no power to dismiss him without alleging a sufficient cause, and having failed to shew that he had violated the discipline of the church, granted an injunction to restrain the governing body from hindering the pastor in the exercise of his office (1); and the Court held, that as the funds of the church had been created wholly apart from the charter of incorporation, and were under the control of the elders and deacons for the support of the minister and other church purposes, and for the relief of the poor, a trust for the plaintiff, the pastor, was constituted, which gave the Court of Chancery jurisdiction; and that although the Crown was the visitor of the corporation, the visitatorial power only related to corporate matters, and did not exclude the right of the Court to inquire whether the deacons and elders had properly discharged their trust towards the plaintiff; and, finally, that the corporation having become divided into two churches, and there being no public officer at the head of the corporation, and such corporation not having been for a long series of years kept up by the appointment of the members necessary to compose it, the bill was properly filed against the governing body of the particular church without making the corporation in its corporate character party to the record (2). The Hospital of St. Cross, in 1157, was established for certain charitable purposes, and was governed by a master and brethren; in 1448 the Rectory of St. Faith was appropriated by the Bishop of Winchester to the hospital, for the purposes of endowing a district charity intended to be established within the hospital. The hospital, which adjoined

(1) *Daugars v. Rivaz*, 28 Beav. 233; 8 W. R. 225; 6 Jur. (N. S.) 854; 29 L. J. (Ch.) 685.

(2) *Ib.*

the parish of St. Faith, had a chapel designed for the use of the inmates, and the master of the hospital was an ecclesiastical person; the power of appointing to the mastership being in the bishop. The parish church of St. Faith was destroyed at some time subsequently to this endowment, and never was rebuilt; and the inhabitants during a long period attended divine service at the chapel of the hospital, and their baptisms, burials, and marriages were performed there; by an Act of Queen Elizabeth it was enacted that the church and possessions of the hospital should remain the property of the hospital and be employed for the charitable uses for which the hospital was founded. The Lords Justices, with the assistance of Wightman and Erle, JJ., upon a petition by the churchwarden (who was in orders) of the parish of St. Faith praying the discharge of an order previously obtained for an injunction restraining him from performing divine service in the chapel of St. Cross, and for liberty to perform his duties as churchwarden; held, dismissing the petition, that this statute of Elizabeth negatived any presumption, which might have arisen from the long use of the chapel, that there had been such a union of the rectory with the mastership of the hospital as to make the chapel of the hospital the parish church of the parish of St. Faith (1); and, *semble* (*per* Wightman and Erle, JJ.), there was no legal mode by which the bishop and the master could effect a union of benefices so as to affect the right of the hospital to the ownership of its chapel; and also, *semble*, that the mastership of an hospital could not be thus united with the rectory of a parish, the duties of the two offices being of distinct natures; and (*per* Lord Justice Turner) the presumption of a union of the rectory with the mastership of the hospital was made more difficult by the fact that such union could not be effected in any ordinary mode without a breach of trust, the rectory being given to the hospital in trust for a district charity (2); and it is no part of the office of a churchwarden to perform or provide for the service of a church during a vacancy in the incumbency; the course to be pursued is for the churchwarden to act under a sequestration to provide for the services; and in so

It is no part of the office of a churchwarden to provide for the service of a church during a vacancy.

He must act under a sequestration to provide for the services, and acts as officer of the bishop.

(1) *Att.-Gen. v. St. Cross Hospital*, 2 Jur. (N.S.) 336; 25 L. J. (Ch.) 202.

(2) *Ib.*

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doing he acts as officer of the bishop and not as churchwarden (1). And where, after a receiver of charity property had been appointed, W. H., the churchwarden of St. Faith, insisting that the chapel within the hospital was the parish church of St. Faith, in order, as he alleged, to try the right, forcibly prevented the chaplain performing divine service therein as he had usually been accustomed to do; the Lords Justices, affirming the decision of the Master of the Rolls, Sir J. Romilly, restrained W. H. from interrupting or interfering with the performance of divine worship in the chapel (2).

Trustees of a chapel cannot set up that their *cestuis que trust*, the congregation, have departed from the original doctrines—to try that proceedings must be taken in the name of the Attorney-General.

3. The trustees of a chapel cannot set up, on an appointment of new trustees, that their *cestuis que trust*, the congregation, have departed from the doctrines upon which the chapel was founded, and therefore that they are not entitled to the enjoyment of the chapel; in order to try that question they must initiate proceedings in the name of the Attorney-General. And where the effect of a deed was the appointment of new trustees of a Baptist chapel, but the object was to transfer the property, without the consent of the congregation, to another church, which had seceded and established an independent place of worship; the Master of the Rolls, Sir J. Romilly, directed the appointment of new trustees, and ordered a conveyance of the property to be made by the trustees under the existing appointment to such new trustees when appointed (3).

No injunction to restrain the pulling down part of an intended church built beyond the regulation line of buildings without the consent of the Metropolitan Board of Works.

4. Where the Ecclesiastical Commissioners had acquired a site for the erection of a church within a metropolitan district, and the church was built, and had been raised six feet, when the vestry of the district interfered, alleging that the building was being erected several feet beyond "the regular line of buildings" in the street, and an application was made for the consent of the Metropolitan Board of Works, which was refused; and the erection being attempted to be continued, the vestry pulled down part of the building, and the commissioners thereupon filed a bill for an injunction; Lord Chancellor Campbell held, reversing the decision of Vice-Chancellor Sir J. Stuart, that upon the construction of the Metropolis Local Management Act (18 & 19 Vict. c. 120, s. 143), and the Metropolis Local Amendment Act (19 & 20 Vict.

(1) *Att.-Gen. v. St. Cross Hospital*, 2 Jur. (N. S.) 336; 25 L. J. (Ch.) 202.

(2) *Att.-Gen. v. St. Cross Hospital*, 18 Beav. 601; 24 L. J. (Ch.) 148.

(3) *Newsome v. Flowers*, 7 Jur. (N. S.) 1268; 31 L. J. (Ch.) 29.

c. 112, s. 3), the powers of the Ecclesiastical Commissioners under the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, and subsequent Acts extending their provisions relating to the affairs of the church, were not reserved to them, nor were they exempted from the operation of the local Act, and dissolved a perpetual injunction which had been granted by the Court below (1).

5. An incumbent of a parochial chapel—created by a private and local Act of Parliament for building a new parish church and the parochial chapel, which contained provisions as to the control to be exercised by the vicar (who was to retain all ecclesiastical dues) over the minister and services of the chapel—was not allowed to restrain the incumbent of the mother church from publishing banns and celebrating marriages between persons resident in the district parish, nor from receiving ecclesiastical dues; on the ground that an order in council purporting, under the 3rd section of the 2 & 3 Vict. c. 49 (The General Church Building Act), with the consent of the bishop alone, upon the representation of ecclesiastical commissioners, to order the assignment of a district to a parochial chapel under a local Act was *ultra vires* (2). And the Court upon the construction of the Church Building Acts (2 & 3 Vict. c. 49; 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 14 & 15 Vict. c. 97; and the 19 & 20 Vict. c. 104), in connection with the above named private local Act, also held that the provisions of a local Act governing a parochial chapel remain in force where they are not specially repealed by the Church Building Acts. The rule of construction, that a general Act of Parliament does not repeal or affect a prior special Act of Parliament without express words of reference, applying to the Church Building Acts (3).

6. The Court of Chancery has no jurisdiction to direct the restoration of the interior of a church to its former condition from which it had been altered, nor to order an incumbent of a church, who has made alterations in the building by removing the pews, and substituting chairs, to take the necessary proceedings to obtain a faculty from the bishop of the diocese for the restoration of the

The Court of Chancery has no jurisdiction to direct the restoration of the interior of a church; but the Court will restrain the alteration of

(1) *Ecclesiastical Commissioners v. Clerkewell (Vestry)*, 7 Jur. (N. S.) 818; 30 L. J. (Ch.) 454. (2) *Fitzgerald v. Champneys*, 2 J. & H. 31; 9 W. R. 850; 30 L. J. (Ch.) 777; 7 Jur. (N. S.) 1006.

(3) *Ib.*

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the walls or brickwork of a church without authority, on Plaintiff undertaking to apply to the Ecclesiastical Court for authority to restore the church.

church (1). But the Court (Lord Chancellor Westbury) granted an injunction to restrain the alteration of the walls or brickwork of the church without the authority of the archdeacon or bishop, on the plaintiff's undertaking to apply to the proper ecclesiastical Court for authority to restore the church to its original state (2).

7. Where a managing body of a religious society appointed an agent at a salary, "with six months' notice of separation on either side," with liberty to occupy and carry on his trade in a house belonging to the society, and afterwards summarily dismissed him for alleged misconduct, and resumed the possession of the house, of which they were afterwards forcibly dispossessed by the agent; on a bill by the managing body, Vice-Chancellor Sir J. Stuart granted an injunction to restrain such agent from disturbing the possession (3).

A dissenting minister is only tenant at will of the chapel and dwelling-house of which possession has been given to him by the trustees. Where a general trust of a public nature is created, a majority of the trustees has the power of binding the minority.

8. A dissenting minister placed in possession of a chapel and dwelling-house by persons in whom the legal estate is vested in trust to suffer the chapel to be used for the purpose of religious worship, is, at Law, only tenant at will to such trustees (4). And where a general trust of a public nature is created it is essential to the purposes of the trust that a majority of the trustees should have the power, both at Law and in Equity, of binding the majority; and therefore where a chapel had been conveyed to trustees appointed by the majority of the men communicants of a congregation of dissenters, for the use of the congregation; and according to the ordinances of the society, the pastor was to be first invited to officiate for a certain time by way of probation, and if approved was to be elected by a majority at a church meeting called for that purpose; and a pastor had been invited to officiate for a year, but before the expiration of that time, was displaced by a majority of the trustees on the ground of alleged misconduct, and the trustees had given notice to the minister that the chapel should be closed against him; and at a meeting professed to be a church meeting, but not duly called, it was resolved that the probationary

(1) *Cardinall v. Molyneux*, 4 De G. F. & J. 117; 7 Jur. (N. S.) 854; 4 L. T. (N. S.) 605.

(2) *Ib.*

(3) *Spurgin v. White*, 2 Giff. 473;

7 Jur. (N. S.) 15.

(4) *Perry v. Shipway*, 1 Giff. 1; 4 De G. & J. 353; 7 W. R. 406; 5 Jur. (N. S.) 535, 1015.

pastor should become pastor, and that new locks should be placed on the chapel door: and by means of locks affixed in pursuance of this resolution a minority of the trustees retained possession of the chapel, and the probationary pastor continued to officiate after the probationary period had expired; the Lords Justices, affirming the decision of Vice-Chancellor Sir J. Stuart, held that the majority of the trustees was entitled to an injunction to restrain the minister from officiating, and the trustees who constituted the minority from acting or permitting the minister to officiate in the chapel (1).

9. Where the coal under parts of the glebe of a vicarage had at different times since 1756, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicars for the time being, the working being conducted solely by underground passages from the adjoining collieries without entering on the surface of the glebe; the Court held, that no presumption could be drawn from these facts that there had been any grant authorizing the vicars to open mines (2); and the incumbent of a living cannot open mines without the consent of the patron and ordinary (3); and *quære*, whether he can do so with such consent, without the sanction of the Ecclesiastical Commissioners (4); and the patron of the living is the proper person to institute a suit to restrain the opening of mines, and generally the only proper person; but, *semble*, the ordinary may take proceedings to prevent waste by collusion between the patron and incumbent; but the patron's right is only to restrain further waste, and does not extend to an account of past profits before the filing of the bill; and upon a bill by the patron to have an agreement between himself and the incumbent for opening and working mines declared void and cancelled, and to restrain future working, the Court declared that the workings were not lawful, and that the proceeds ought to be laid out for the permanent benefit of the living; but, being of opinion that if duly authorized the workings would be beneficial to the living, directed an inquiry what steps should be taken to obtain the concurrence of all necessary

(1) *Perry v. Shipway*, 1 Giff. 1; (2) *Bartlett v. Phillips*, 4 De G. & 4 De G. & J. 353; 7 W. R. 406; J. 414.
5 Jur. (N. S.) 535, 1015.

(3) *Holden v. Weekes*, 1 J. & H. 278.

(4) *Ib.*

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Purchasers of family graves in perpetuity in a private burial ground attached to a dissenting chapel, are entitled to an injunction restraining the trustees from removing, &c., graves or gravestones, &c.

Mortgagees of land set apart as a burial-ground purchased in perpetuity will be restrained from destroying graves or preventing future interments.

parties, and gave liberty to continue the workings in the meantime, subject to account (1).

10. Where persons had purchased family graves in perpetuity in a private burial ground attached to a dissenters' chapel, which was afterwards closed by order of the Queen in Council, under the provisions of the 15 & 16 Vict. c. 85, and there was no formal grant executed, but their title was merely evidenced by a receipt for the purchase-money, stating the purchase; the Master of the Rolls, Sir J. Romilly, held that they were entitled to an injunction to restrain the trustees from removing, obliterating, or defacing the graves or gravestones or monuments belonging to the plaintiffs, and from applying the ground to other purposes; but that the injunction could not be extended to the graves and vaults of other purchasers not parties to the suit; and that the rights of the trustees to the remainder were unaffected; and that the injunction could not be extended to restrain them from applying this latter ground purchased by them to such purposes as they might think proper (2).

And where land has been set apart as a burial ground, in which burial places have been purchased in perpetuity, a Court of Equity will restrain the holders of the legal estate, though claiming as mortgagees, from destroying or defacing such graves, or doing any act which may prevent future interments. And where the trustees of a chapel and burial ground had executed a mortgage of the property, which was described in the conveyance as "a chapel and burial ground," the Master of the Rolls held, that this amounted to notice to the mortgagee and those claiming under him of the purposes to which the property was applied, and that they could not, as against the plaintiffs, who were subsequent purchasers of graves and vaults in perpetuity, and who had been in possession for upwards of twenty years, apply the ground purchased by them to any purposes other than those of burial (3). But where a bill was filed by a parishioner on behalf of himself and all others, for an injunction to restrain the defendant, the rector of the parish, from building a school-house in the churchyard, the Court refused the injunction, the injury not being of an irreparable nature; and,

(1) *Holden v. Weekes*, 1 J. & H. 278. 1189; 25 L. J. (Ch.) 883; 26 L. J.

(2) *Moreland v. Richardson*, 22 Beav. (Ch.) 690.

596; 2 Jur. (N. S.) 726; 3 Jur. (N. S.) (3) Ib.

semble, the Court has no jurisdiction to interfere at the instance of a parishioner (1). The Court has jurisdiction to restrain, at the suit of the churchwardens of a parish, a person pulling down the church-yard wall, though in assertion of an alleged right of way, because though the churchwardens might not be able to maintain an action at law for such trespass, they might have redress in the Ecclesiastical Court; and the Vice-Chancellor, Sir L. Shadwell, said that, in his opinion, this Court ought, in such a case, to be ancillary to the Ecclesiastical Court, and to grant an injunction as in other cases where any act in the nature of waste is threatened or committed (2).

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The Court will restrain the pulling down the church-yard wall.

11. On the principle of protecting property pending litigation, the Court will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a defendant claiming to be a purchaser for valuable consideration without notice under it (3). And in *Potter v. Chapman* (4) the Court granted an injunction, till answer and further order, on the filing of a bill, and before the defendants had appeared, prohibiting the bishop from inducting one of the defendants or any other person to a living; on the ground that the defendant C. was devisee in trust to present the plaintiff, and had procured himself to be presented for institution and induction. And where the bill stated that the inhabitants of Bilston were entitled to elect a minister to a chapel there, within the jurisdiction of the Dean of Windsor and Wolverhampton, and that the custom of electing a minister, when the office was contested, was for the votes to be taken either in the chapel or an adjoining school-house, and in one place only, and in the presence of the chapel-wardens, who were to provide a parchment roll, duly stamped, for each candidate, on which the voters entered their names in their own writing, with a seal on the same line with every name; that the poll was kept open for an indefinite time, and that the roll of the successful candidate was signed at the foot of it by the wardens and attested by two witnesses, and then formed the official instrument of nomination; that an election had lately taken place, in which the wardens appointed four polling places, of which the school-house was one, that the names of

The Court will, in a suit to impeach a conveyance of the advowson, restrain the institution of a clerk.

The Court will in a proper case restrain the bishop from inducting.

(1) *The Earl of Fitzwilliam v. Moore*, Fl. & K. 287; 3 Ir. Eq. Rep. 615.

(3) *Greenslade v. Dare*, 17 Beay. 502.

(2) *Marriott v. Tarpley*, 9 Sim. 279.

(4) *Dick* 146; *Amb* 98.

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The Court will in a proper case restrain an archbishop from collating for lapse to a deanery.

The Court will in a proper case restrain a bishop from taking advantage of a lapse in a living.

The Court will in a proper case restrain trustees of a chapel from electing a minister.

the voters were entered in polling-books by assessors appointed by the wardens; that there were no parchment rolls; that the poll was kept open for five days only, and that the result of the election was reported to the Dean of Windsor by a letter signed by the wardens only, and unattested; on a motion to dissolve an injunction, which had been obtained *ex parte*, to restrain the Dean of Windsor from licensing the minister whose name had been so returned by the chapel-wardens, when it appeared that the mode in which the election was taken had been previously agreed on by the candidates, and approved of by a resolution at a public vestry-meeting of the voters, and that nearly all the voters polled; the injunction was dissolved with costs (1). The Court in Ireland granted an injunction to restrain an archbishop from collating by way of lapse, to a deanery pending a suit in the Consistorial Court respecting the presentment by the chapter (2). And where the subject of litigation (this case being a suit for specific performance of an agreement for the sale of the next presentation) was the next presentation to a living then vacant, the bishop in whose diocese it was situate was restrained from instituting, &c., and from taking advantage of any lapse pending the suit (3). And in *Milligan v. Mitchell* (4) an injunction was granted upon affidavit, before answer, to restrain the defendants, trustees of a chapel erected by a Presbyterian congregation for religious worship, according to the usages, discipline, and doctrine of the Church of Scotland, from electing as minister a person not duly licensed by that church: but an injunction to restrain them from allowing persons not so licensed to officiate, and from preventing persons so licensed and otherwise duly authorized from officiating during the intermediate period prior to such election, was refused. And where persons who were merely hirers and occupiers of seats or pews in a dissenting meeting-house, which was held in trust for the use of the congregation, but who did not take the sacrament there, had been excluded from voting at the election of a minister to officiate in the meeting-house, the Court refused an application for an injunction to restrain the individual so elected from acting as minister

(1) *Davies v. Banks*, 5 L. J. (N. S.) Ch. 274.

(2) *Daly v. Archbishop of Dublin*, Fl. & K. 263.

(3) *Nicholson v. Knapp*, 9 Sim. 326.

(4) 1 My. & K. 446.

or receiving the emoluments attached to his office (1). And where, by neglect, the number of trustees in a trust to present to a living was not filled up at the time of an avoidance, the Court would not by injunction prevent the effect of a presentation, under the legal title of the heir of the surviving trustee, without a special ground; but the Court will take care as to the future that the trust shall be properly filled up (2). But where lands and a free chapel were vested in two persons by grant, and the original grantees vested them in feoffees for ever, with a power to appoint new ones whenever the number should be reduced to four, but there was no provision that a particular number should form a quorum, nor, in terms, was there any power to appoint a minister, but the rents were to be paid to one; and appointments of feoffees and ministers took place until 1823, when a scheme was proposed, a reference directed, and orders made upon it; and in 1866 the feoffees were reduced to three, one being incapable of acting, and the other two by deed, to which all three were parties, but which was only executed by two, appointed H. as minister; and a bill and information were filed to restrain the appointment against the feoffees, vicar, and bishop; but a second appointment was made after an injunction had been granted; Vice-Chancellor Sir R. T. Kindersley held, that the appointment by the two feoffees was valid, and that the second appointment after an injunction had been granted was also valid, and dismissed the bill with costs as against the feoffees and bishop; but, inasmuch as the vicar had appeared and then disclaimed, as against him without costs. The Vice-Chancellor said that he thought he might say that the right of election being in trustees, nothing being said as to number, or what should form a quorum, whatever happened to be the number they had a right to appoint and nominate. And the Court will not interfere to prevent the removal of the minister of a dissenting chapel vested in trustees, when the deed is silent as to the mode of electing the minister and his continuance in office, and contains no provision for his support, but he is dependent for it on the voluntary contributions of his flock (3). In *Foley v. Wontner* (4) Lord Chancellor Eldon ob-

No interference to prevent removal of minister of a dissenting chapel where there is no provision for his continuance in office.

(1) *Leslie v. Birnie*, 2 Russ. 114.

(3) *Porter v. Clarke*, 2 Sim. 520.

(2) *Att.-Gen. v. Bishop of Litchfield*,

(4) 2 Jac. & W. 245, 247.

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A dissenting meeting-house must continue devoted to the doctrines of the foundation of the trust.

served that the Court could do very little in cases where it was called upon to execute trusts with respect to dissenting meeting-houses held under trust deeds; and, pending a suit for the regulation of a dissenting meeting-house, the practice of the Court is, if it finds a minister in possession, and ministering in the way in which it was the meaning of the congregation he should, preaching the doctrines that were intended, to continue him in the meantime, whether he was duly appointed or not. But a dissenting meeting-house must continue devoted to the doctrines usually agreed on at the foundation of the trust, though some of the congregation may change their opinions (1). And in *Attorney-General v. Pearson* (2) Lord Chancellor Eldon said, that the Court is unquestionably bound to administer trusts for the benefit of Protestant dissenting congregations, consisting in the application of trust property to the maintenance of a preacher to the congregation.

12. Where the trustees of a chapel were proceeding to mortgage it for a small sum, without any apparent necessity for such a course, Vice-Chancellor Sir W. P. Wood granted an injunction to restrain them from executing such mortgage, the plaintiff undertaking to abide by any order the Court might make as to the payment of the debt proposed to be secured (3).

13. Where a rector, who was also the patron of a living, had given warrants of attorney to various creditors who had mortgages on the advowson, subject to an agreement that the judgment to be entered up by the first mortgagee should have priority over the rest whenever execution should be issued; Vice-Chancellor Sir J. L. Knight Bruce held, that the agreement pointed so particularly to making the judgments charges on the living that the Court could not, without giving its aid to simony, at the suit of the first mortgagee, give effect to it by granting an injunction and a receiver to restrain the other judgment creditors from recovering from the sequestrator, under a sequestration issued by puisne mortgagees, the money in the sequestrator's hands (4). But the Court, in *Silver v. Norwich (Bishop of)* (5), upon a bill by annuitants, in respect of annuities charged on rectories and a vicarage, appointed a receiver of

(1) *Foley v. Wontner*, 2 Jac. & W. 245, 247.

(2) 3 Mer. 353, 396.

(3) *Rigall v. Foster*, 18 Jur. 39.

(4) *Long v. Storie*, 3 De G. & Sm. 308.

(5) 3 Sw. 112.

the profits of a rectory under sequestration, and granted an injunction against enforcing sequestrations by certain of the defendants, alleged by them to be prior to the plaintiffs. And in *White v. Peterborough (Bishop of)* (1), where a third incumbrancer on a rectory had obtained a sequestration, a receiver was appointed at the instance of a second incumbrancer, with a direction that the receiver should, after the priorities of the incumbrancers had been ascertained, pay, according to the priorities, what was due in respect of the incumbrances.

14. In *Durston v. Sandys* (2), where the defendant, upon his presenting the plaintiff to a parsonage, took a bond of him to resign, which, though in itself lawful, yet the patron making an ill use of it—viz., to prevent the incumbent from demanding tithe of the defendant—the Court granted a perpetual injunction against the bond.

15. Where the trustees of a chapel, not endowed within the 11 & 12 Geo. 3, c. 16, applied, according to the trusts of the deed, the sacramental and other collections to the maintenance of the chapel and the payment of the chaplain, &c., for some years, without the interference of the rector of the parish, who at last, along with the churchwardens, filed a bill for an account of the sums received by the trustees, and an injunction to restrain them from applying the collections; and, pending the suit, the rector proceeded before the archbishop, and had the chaplain's license withdrawn, in consequence of which the chapel was closed; the Court, although of opinion that the collections belonged to the plaintiff, for the benefit of the poor of the parish, refused an account against the trustees, who had acted according to their trusts, and the injunction, as the plaintiff had rendered it unnecessary by his proceeding before the archbishop; and such a suit should be by information, and not by bill (3). The Vicar-General of the Roman Catholic Church at Gibraltar is liable to account for the fees received by him for administering the offices of the church, such fees being by custom regulated and subject to the control of the assembly of elders, or *junta*, of which he is the head, and disposed of by them for the general purposes of the church; but a decree, granting an injunc-

(1) 3 Sw. 109.

(2) 1 Vern. 411.

(3) *Magee v. Bishop of Cashel*, 9 Ir. Eq. Rep. 319.

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tion against the receipt of such fees by the vicar-general, and directing him to replace, in certain parts of the church, the tariff, or table thereof, was, on appeal, varied by the Privy Council by dissolving the injunction, and decreeing him only to account, as receiver, for all sums paid to him on account of the same (1).

16. Where the clerk of a patron who had recovered in a *quare impedit*, filed a bill under the Act of 1 Geo. 2, c. 23, against the bishop presenting and his clerk, for an account of the profits of the benefice pending the litigation, and it contained charges of acts of interference with the profits, and of waste by the cutting of trees and otherwise, "by the defendants, or one of them," and of a conversion of a portion of the profits "to their own use," a general demurrer by the bishop was allowed; but the Court also held, that such clerk defendant is liable, in a suit instituted in the Chancery Court under 1 Geo. 2, c. 23, to account for the waste committed, and that the incumbent's remedy for such dilapidation is not confined to a proceeding in the Ecclesiastical Court under 11 Will. 3, c. 6, and 12 Geo. 3, c. 10 (2).

Mortgagor of
a manor with
advowson
appendant
presents.

17. Where a manor with an advowson appendant is mortgaged, and the church becomes void, the mortgagor shall present, unless foreclosed; and if, pending a suit by the mortgagee to foreclose, the church becomes vacant, though the defendant has no bill to redeem, yet being ready and offering to pay the principal, interest, and costs, the Court will grant an injunction to stay proceedings in a *quare impedit* brought by the plaintiff, for the mortgagee can make no profit by presenting to the church, and the mortgagee, until a foreclosure, is but in the nature of a trustee for the mortgagor (3).

18. Upon a bill filed to establish a right to a chancel as part of a parish church, against the lord of a manor, who claimed it as appendant to the manor or manor-house; it appearing that the chancel was an ancient chapel coeval with the church, and that it was a private chapel erected by the lord of the manor; Vice-Chancellor Sir R. T. Kindersley held, that the immemorial use and occupation, coupled with reparation, entitled the lord of the

(1) *Hughes v. Porral*, 4 Moore, 41.

(3) *Amhurst v. Dawling*, 2 Vern.

(2) *Crompton v. Bishop of Meath*,

401; *et v. Att.-Gen. v. Heaketh*, 2 Vern.

1 Sau. & Sc. 297.

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manor by prescription to the perpetual and exclusive use of the chancel; and that this right might exist notwithstanding that the freehold might not be in the person prescribing, and although the estate or house to which the chancel was appendant might not be situate in the parish (1).

19. Where the vicar of a parish suffered judgment to be entered up against him in the Court of Exchequer for a debt, in virtue of which the tithes, rents, and profits of the vicarage were sequestered; and after the sequestration had continued for some time the vicar filed his bill against the judgment creditor, the sequestrator, and the bishop, praying that an account might be taken of the tithes, rents, and profits of the vicarage received by the defendant B., the sequestrator, and of the payments by him in respect of such tithes, &c., to the defendant J., the judgment creditor, and to ascertain what remained due upon the judgment and writ of sequestration, and for an injunction to restrain the judgment creditor from proceeding with an action against the plaintiff to enforce the covenants for the payment of the purchase-money of the advowson; Vice-Chancellor Sir W. M. James held, that the bill must be dismissed with costs against the sequestrator and bishop on the ground of want of privity, and against the judgment creditor on the ground that the matter was one exclusively for the Court of Common Law out of which the execution had issued; the Vice-Chancellor said he was not aware that there was any ground for saying that this Court had authority to take the account against the sequestrator for the mere purpose of discharging a sequestration under a legal judgment (2).

20. A Court of Equity will not aid a congregation to remove their minister where they, having a power to remove him at discretion, have exercised that power oppressively; the Court will not give any aid against a defendant where the action taken against him by the plaintiff has been oppressive. And where a notice convening a meeting, expressed to be "for the purpose of bringing charges against and considering the dismissal of T. B., a minister of a chapel," was sent round to the members of the congregation,

Equity will not aid a congregation against its minister where it has acted oppressively.

(1) *Churton v. Frewen*, L. R. 2 Eq. 634; 12 Jur. (N. S.) 879; 35 L. J. (Ch.) 692; 14 L. T. (N. S.) 846.
(2) *Williams v. Ivimey*, 23 L. T. (N. S.) 100.

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who had power to dismiss the minister at discretion ; and a second notice was given of another meeting, expressed to be held for the purpose of confirming the resolutions passed at the first meeting ; Lord Chancellor Hatherley, upon a bill filed for the purpose of obtaining a declaration that the defendant was no longer minister, and for an injunction to restrain him from the use of the chapel, held, affirming the decision of Vice-Chancellor Sir W. M. James, that the notices were not proper or sufficient, and that the resolutions for dismissing the minister come to at the meetings convened in pursuance of the notices were invalid, as there had not been any exercise of discretion by the congregation at the meeting (1).

The Court will restrain interference with induction to a benefice.

21. The issuing of a writ *de vi laicâ removendâ* from the common law side of the Court of Chancery has fallen into desuetude, as the same relief can be obtained by injunction in a case of obstruction to the induction of a party to a benefice, to restrain all interference therewith (2).

Trustees of a religious society will be restrained doing any act obstructive of the enjoyment of the property for the purposes authorized.

22. Whenever the trustees of a religious society, organized under the (Ill. U.S.) general law concerning their incorporation, do any act which obstructs the enjoyment of the property for the purposes and in the mode authorized by the usages of the church as an organized body, they are guilty of a violation of the trust, which, as in other cases of trust, will be corrected by a Court of Chancery. So, although a *mandamus* might lie, or though the statute has authorized the members of the church to remove the refractory trustees and elect others. Hence an injunction lies where the trustees, by direction of a minority of the members, close the church edifice against their minister and those disposed to attend upon his ministrations, and contrary to the wish of a majority of the members. So, although the particular act of closing the church was already done, it was not like a simple act of trespass, but was a continuing act, designed to deprive the members of the church and their pastor of their rights in the future as well as in the past (3). So, where land had been conveyed to the defendants, trustees of a religious society, for the use of such society, according to the discipline, &c.,

(1) *Dean v. Bennett*, 19 W. R. 363 ; 583 ; 17 W. R. 502.

18 W. R. 487.

(3) *Brunnenmeyer v. Buhre*, 32 Ill.

(2) *Jenkins, In re*, L. R. 2 P. C. 258 ; 183 (Amr.)

38 L. J. (P. C.) 6 ; 19 L. T. (N. S.)

and the society erected a church thereon, the basement of which was made for a prayer-room; and the defendants leased the basement to the teacher of a common day-school, with permission to make the changes in the room suitable for such purpose; it was held that the plaintiffs, members of the society, might have an injunction against such leasing (1).

23. Where land has been dedicated by the owner for a burial-place and a school-house lot, and the school directors are about to rebuild the school-house; the heir of the donor, not being a resident of the town, has no interest such as authorizes him to interfere by injunction; the Courts would interfere to prevent any encroachment upon the burial-place. But the building of a new school-house upon the portion of the lot dedicated for school purposes is not such an encroachment; hence the directors had the right to rebuild, and the decree of the Court below, restraining them, was error (2).

24. Where a bill was brought by the plaintiffs alleging themselves to be trustees and agents for the German Lutheran Church, composed of the members of the German Lutheran Church of Georgetown (U.S.), on behalf of themselves and the members of the said church, charging, amongst other things, that the lot in question had been laid out for the sole use and benefit of the Lutheran Church for religious purposes, and that the possession of the plaintiffs had never been questioned, and that the lot had been exempted from taxation as property set apart for a religious purpose; and that R., one of the defendants, had unwarrantably disputed their title; and had entered upon the lot and removed some of the tombstones, and meant to dispossess the plaintiffs, and to remove the tombstones and graves; and praying that a writ of injunction might issue; the Court held, upon the facts of the case, amongst other things, that the appropriation should be sustained, as a dedication of the lot to public and pious uses, rendered valid by the Bill of Rights of Maryland, which recognised the doctrines of the Statute of Elizabeth relating to charities; and Judge Story closed his opinion in favour of an injunction as follows: "No action at law would afford an adequate and complete

The Court will restrain the removal of tombstones and graves.

(1) *Perry v. M'Ewen*, 22 Ind. 440 (Amr.) (2) *Pott v. School Directors*, 42 Penn. 132 (Amr.)

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remedy. This is not the case of a mere private trespass, but a public nuisance going to the irreparable injury of the Georgetown Congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of Law. The remedy must be sought, if at all, in the protecting power of a Court of Chancery, operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living" (1).

25. In *Greencastle v. Hazelett* (2) it was held that a city (U.S.) cannot be enjoined from establishing and using lands as a cemetery on the ground that the drainage above and below the surface leads into a choice spring of the complainant, an adjoining owner, which will thus be rendered valueless by the proposed use of the land.

(1) *Beatty v. Kurtz*, 2 Pet. 566, 579, 581, 584 (Amr.)

(2) 23 Ind. 186 (Amr.)

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